

No. 12222

United States
Court of Appeals
for the Ninth Circuit

LOEW'S, INCORPORATED, a Corporation,
Appellant,

vs.

LESTER COLE,
Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 499 to 988, Inclusive)

Appeal from the United States District Court
for the Southern District of California
Central Division

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(Testimony of Lester Cole.)

on the night of October 19, 1947. You had knowledge, had you not, that Mr. Kenny and these other attorneys who represented you were going to see certain persons connected with the motion picture industry?

A. I knew they were going to see Mr. McNutt and Mr. Johnston and other—attorneys connected with them.

Q. That had been discussed before Mr. Kenny and these other gentlemen went to that meeting?

A. I was so informed.

Q. Yes. Now, was there any kind of a meeting at which you got that information?

A. Well, I wouldn't attempt to characterize it, sir. I know that we had rooms there in the Shoreham Hotel and that there were a number of the men who were there, who were present at the time that Mr. Kenny said that, and explained that he was going up to this meeting, that this meeting was going to take place.

Q. You say a number of them had rooms. Who are the persons you refer to?

A. The attorneys and some of the other witnesses who were to appear before the Committee. [470]

Q. Well, who are the other witnesses who were to appear before the Committee that had rooms in the Shoreham Hotel?

A. Well, I am not sure that I could remember exactly.

Q. Well, will you give us them to the best of your recollection with regard to that?

A. But I know that Mr. Lewis Milestone and Mr.

(Testimony of Lester Cole.)

Rosson—if you will recall, sir, the time was—well, you weren't there but the housing problem and hotel problem did exist, and a number of us were doubled up; I know that I was in a suite with Mr. Lewis Milestone. By suite I mean two bedrooms in which four of us were; and that these rooms were located not far from where the attorneys had their suite of rooms with a sort of living room in connection, it was on the same floor where we were and that, it being the one living room that we could all use, that this was the place where we gathered with our attorneys.

Q. Yes. Now, are those names with which you can supply me?

A. I would like to be accurate about this. I know that there were a number of men, 19 I believe, who were so classified as unfriendly witnesses whom the attorneys represented. Any or all of them may have been there or some of them may not have been. It would be very difficult for me to attempt at this time to say exactly who was there and who was [471] not there.

Q. Well now, which of these men, as nearly as you can recall, were present at the time that there was the discussion to the effect that Mr. Kenny and these other attorneys were going to meet with these named representatives of the motion picture industry or some portion of them?

A. I really couldn't say, Mr. Walker. It may have been one or the other of them, of any number of them. I would say that a number of the men were there but

(Testimony of Lester Cole.)

whether they were all there or how many I don't remember.

Q. Well, do you recall whether Mr. John Howard Lawson was there?

A. I do not. I do not recall, sir.

Q. Do you remember whether Mr. Trumbo was there?

A. I wouldn't say yes or no. It is quite possible.

Q. Do you remember whether Mr. Scott was there?

A. It is very possible, sir.

Q. Do you remember whether Mr. Dymytrk was there?

A. It is extremely possible.

Q. Mr. Bessie? A. Very possible, sir.

Q. Mr. Ornitz?

A. Well, I would say that it is possible that they were all there, any number of them.

Q. There were quite a number? [472]

A. There were some of them there, yes, sir.

Q. (By the Court): What is your best recollection, whether they were there or not?

A. I have a recollection, your Honor, that there were a number of men present in the room, but I wouldn't attempt to say how many.

The Court: That isn't the point.

Q. Were the men that Mr. Walker has mentioned, so far as you know now, among those present? If you are not positive, you can say you think so or don't think so.

A. That is what I tried to indicate, your Honor. I think so.

(Testimony of Lester Cole.)

Q. In other words, you think the persons whose names he has mentioned so far were present?

A. I think they were.

The Court: All right.

Q. (By Mr. Walker): Do you think Mr. Biberman was there?

A. I think so, but I am not sure.

Q. Well, your recollection is the same as with reference to the others that I have named, that he was probably there?

A. That is the point that I have been trying to make, Mr. Walker.

Q. This was a meeting that you regarded as an important [473] one, was it not?

A. Yes, I do.

Q. And the meeting that was to be held with the persons who represented the industry or some portion of it was a meeting which you regard as an important meeting?

A. Yes, I would say it was.

Q. Now, I take it that from what you have said, the statement by Mr. Kenny and the other attorneys as to this meeting that was to be had was made to all of you, it wasn't made to each one of you as an individual, it was made to the group who were present?

A. I believe that is correct.

Q. Now, when the meeting with Mr. Johnston, Mr. Eric Johnston, and Mr. McNutt and Mr. Benjamin had been held, you had said that a report was made by Mr. Kenny and these other attorneys who represented you of the meeting which had been held. Who

(Testimony of Lester Cole.)

was present? In the first place, let me ask you where the report was made?

A. It was made in this living room of the suite in the Shoreham Hotel.

Q. That is the suite, as I understand it, that was shared by you and Mr. Milestone and some of the attorneys?

A. No, sir. We weren't in this suite. We were down the hall from it. This was the suite that was shared by the attorneys with the living room attached to it. [474]

Q. All right. And who was present when the report was made?

A. To the best of my recollection, the people who were there at the time when the attorneys were going up to speak to them—I don't recall the length of time that elapsed. [475] But I do know that it was considered a matter of great interest and that all of the men who were involved in this were extremely anxious to know what position the heads of the industry and the spokesmen for the industry were going to take in this matter.

Q. And would you say that to the best of your recollection all of these men that you have previously mentioned as being present at the meeting which was held before Mr. Kenny and the other lawyers went to the meeting with Mr. Johnston and these other people, were present to hear the report?

A. I would say substantially the same group, yes, sir.

Q. And all of the lawyers whom Mr. Kenny has

(Testimony of Lester Cole.)

identified as representing this group were present when the report was made to you and to the other people?

A. Well, again, I can't say positively, but I would say that they were possibly.

Q. You know that it wasn't just Mr. Kenny who came back and made the report?

A. That is correct.

Q. There were at least several of your lawyers—

A. Yes, I believe there were.

Q. And lawyers for the group—

A. That is right.

Q. —that came back and made the report? [476]

A. Yes.

Q. Now, the particular session of the hearings of the Un-American Activities Committee, with which you were concerned, commenced the next day, did they not, on October 20th?

A. I didn't appear until the 30th of October.

Q. I understand that you did not actually give your testimony until the 30th of October, but, you know, do you not, from your own knowledge, because you were there in Washington, that these hearings commenced the day following—

A. Yes, sir.

Q. —your report which you received?

A. Yes, sir. That is correct.

Q. Were you in Washington throughout the period when these hearings were on and up to the time that you gave your own testimony?

A. I believe that I was.

(Testimony of Lester Cole.)

Q. Well, you know that you were, don't you, Mr. Cole?

A. Yes.

Q. And did you attend the hearings?

A. Yes, I did.

Q. You attended all of the hearings down through the period of time when you yourself testified?

A. Yes, I did.

Q. So, you heard, then, the testimony of all the different witnesses who appeared before the Committee and gave their testimony?

A. Well, I attended all these sessions, but I won't say that I attended every moment of every session and therefore I couldn't say, I couldn't answer that question.

Q. Well, you were substantially there all the time?

A. Yes, that is right.

Q. I take it that you may have stepped out of the committee room for a few minutes, but you were as constantly in attendance as you could be?

A. I could have stepped out for a half of the day, as well, Mr. Walker.

Mr. Walker: I see. Now, I would like to call your attention—have you a copy of that?

I am handing the witness, may it please the court, the paper bound book which has been identified as a proper record of the hearings that were had between October 20th and October 30, 1947.

Q. I direct your attention to page 323 where Mr. Eric Johnston is under examination by the committee, and I will ask you whether or not, before you had testified on October 30th, you were present and

(Testimony of Lester Cole.)

heard this testimony, by Mr. Johnston: It begins at the top of page 323.

“Mr. Stripling: Mr. Johnston, you were present this morning when we heard Mr. John Howard Lawson, were you not? [478]

“Mr. Johnston: I was.

“Mr. Stripling: Did you hear the evidence which was submitted to the committee regarding his Communist affiliations?”

Mr. Katz: Now, just a moment. You are now asking him about Mr. John Howard Lawson and what he heard in that connection.

Mr. Walker: I am asking him if he heard the testimony of Mr. Eric Johnston.

Mr. Katz: Well, then, it should go in with that admonition, that it was simply a matter heard by Mr. Cole.

The Court: That is right.

Mr. Katz: And with no bearing at all upon Mr. Cole's—

The Court: Just a moment. Well, you have asked him if he heard Mr.—

Mr. Katz: That is right. It went in under an admonition.

The Court: All right. Well, I will see what is brought in and I will see what admonition to give. Mr. Cole testified that, before he answered the question, he read certain statements and heard certain testimony. Among the things he said he heard, he said was the testimony of Mr. Johnston before the committee and a portion of that testimony was read

(Testimony of Lester Cole.)

to him and called to his attention. Now they are calling his attention to other portions of the testimony, merely to test his recollection as to what he heard, if [479] anything. Go ahead.

Mr. Walker: Of course, your Honor, I am not imposing any limitations upon this myself. I am offering it in evidence.

The Court: Well, no limitations have been imposed. I am merely admonishing the jury that they are to consider not the truth of any statements made by—concerning neither, but what statements were made, only on their effect. We are discussing all these things merely to determine what if any effect they had upon Mr. Cole's conduct, and that is the scope of the admonition I am giving.

Mr. Walker: All right, I will now go back to the testimony of Mr. Johnston.

The Court: All right.

Mr. Walker: Which Mr. Cole has indicated—of which he has indicated he heard some:

“Mr. Stripling: Did you hear the evidence which was submitted to the committee regarding his Communist affiliations?

“Mr. Johnston: I did.

“Mr. Stripling: Did you hear the memorandum which was read regarding his Communist affiliations?

“Mr. Johnston: I did.

“Mr. Stripling: If all of the evidence which was submitted was proved to your satisfaction to be true, would [480] you say Mr. Lawson had any place in the motion-picture industry as a picture writer?

(Testimony of Lester Cole.)

“Mr. Johnston: If all of the evidence there is proved to be true, I would not employ Mr. Lawson because I would not employ any proven or admitted Communist because they are just a disruptive force and I don’t want them around.

“Mr. Stripling: They could be a disruptive force within the motion-picture industry; isn’t that true?

“Mr. Johnston: Of course.

“Mr. Stripling: Don’t you think this committee has an obligation to expose them if they are there?

“Mr. Johnston: I have always said that you did, but I have always thought you should do it under the American program of a free and fair trial. I have never objected to your investigating Hollywood. I told you we welcomed it, and we sincerely do. We haven’t always welcomed some of the methods you have adopted.”

Did you hear that testimony?

A. Yes, I did, Mr. Walker.

Q. (By Mr. Walker): Then I call your attention to a portion of Mr. Johnston’s testimony which you will find on page 326, well toward the bottom of the page, Mr. Cole, question by Mr. Vail. Have you located it? It is the last question on page 326.

A. Yes, I see. [481]

Q. Mr. Vail was a member of the committee, was he not? A. Mr. Vail?

Q. Yes.

A. Yes, he was a member of Congress—of the committee.

Q. I shall now read you questions and the an-

(Testimony of Lester Cole.)

swers to which I wish to call your attention:

“Mr. Vail: I assume that your attitude with respect to the fact that this investigation is warranted hinges largely upon the fact that this type of investigation must precede the recommendation of a congressional committee for legislation that will afford protection to the American people?

“Mr. Johnston: Yes. Mr. Chairman, I have said before that I feel there are two duties of Congress, to prove whether Communists are foreign agents and/or are they trying to upset our Government by unconstitutional means.

“I think that is a duty which Congress has to perform. Personally I feel that the Communist Party, if I might philosophize for just a moment, Mr. Vail, I feel that the Communist Party is intellectually and morally bankrupt. I feel that those members in America, who are the dupes of the Communist Party and dance when the Kremlin pulls the strings, have had to change their line to cover that tremendous intellectual bankruptcy. The Communist Party is, as the [482] Fascist Party was, based on hate, and the history of the world shows that that is never successful. The Fascist Party was overthrown because it was based on hate. The Communist Party is based on hate—the class struggle—and I don't think the Communist Party can succeed either, Mr. Vail. And, certainly, I think it is the duty of the Congress to point out to the American people the dangers, and I think it is the duty of Congress to determine whether these people are foreign agents or not,

(Testimony of Lester Cole.)

and if so, are they attempting to disrupt our Government by unconstitutional means.

“Mr. Vail: That is exactly the job in which this committee is now engaged. The motion-picture industry is clearly one factor in the entire group of factors that must be explored by this committee before it can present to the Congress its recommendations for legislation. You and I know that the international situation is tense today, and since we have the statement of no less an authority than Edgar Hoover and former Ambassador William Bullitt, to the effect that the Communist Party is the agent of a foreign power, it certainly is the job of Congress to check into it and be certain that agents of a foreign government are not circulating freely in this country.

“Mr. Johnston: I think you are right. We welcome that, Mr. Congressman.”

Did you hear that testimony? [483]

A. Yes, I did.

Mr. Katz: Now, with respect to the comments of Mr. Vail as to what was the duty of the committee or not, we ask a particular admonition there. Mr. Cole's course of conduct could be shaped by what the representatives of his industry said and certainly not with respect to what a particular Congressman may have said.

The Court: Yes.

Mr. Katz: Concerning what his duty was or was not.

Mr. Walker: Just a moment.

(Testimony of Lester Cole.)

Mr. Katz: He was an ex-Congressman, Mr. Kenny tells me.

Mr. Walker: And the gentleman was a Congressman at the time of this hearing. Whether he is or is not a Congressman at the present time is no part of this record. And may I say this: There is introduced testimony of Mr. Johnston's statement immediately following a statement of Mr. Vail:

"Mr. Johnson: I think you are right."

The Court: All right. I will say this: This witness, the plaintiff here, has a right to draw inferences from what his employers say and that is the object of all this testimony but he is not bound to draw any inference from what any member of the committee said while examining a representative of the employer. Is that a fair statement?

Mr. Katz: Yes. [484]

Mr. Walker: That isn't a fair statement of what the Committee man says, unless it is endorsed by one of the people of the industry.

The Court: That is right. Thank you. Unless it is endorsed, unless it is endorsed by the representative of the industry who was speaking. All right.

Mr. Walker: Of course, may I say, your Honor, while I think your statement is entirely correct, it is not applicable to this particular quotation of the fact that Mr. Johnston, who has been identified a number of times with the moving picture industry,

(Testimony of Lester Cole.)

did in effect, by saying "I think you are right," adopt the statement of the Congressman.

The Court: That is right. What I say applies to the entire situation.

Mr. Walker: Yes, your Honor.

The Court: Not so much to the particular statement, because where a representative of the industry answers, categorically adopts a statement made by a member of the Committee as his own, it was as though he had made the statement himself. All right.

Q. (By Mr. Walker): Now, Mr. Cole, I call your attention to page 328 and to that portion of Mr. Johnston's statement which begins with the words very near the top of the page, the first full paragraph on page 328, the words, "We do not attempt," reading as follows (this is Mr. Johnston [485] speaking):

"We do not attempt, and I have in no way attempted, to criticize the members of the committee. We feel that you are doing a job which has to be done. We have criticized sometimes, Mr. Vail, the methods in which it was done, because we feel that people should not be smeared with communism unless they have a fair trial and opportunity of proving whether they are or not. That is the American tradition, Mr. Vail."

Did you hear that statement?

A. Yes, I did.

Q. Now, if you will turn to page 72, Mr. Mayer is under examination by the Committee, and you

(Testimony of Lester Cole.)

recall having discussed with Mr. Mayer the treatment which in accordance with your testimony Mr. Mayer complained of having received at the hands of the Committee? A. Yes, sir.

Q. The examination is being made by Mr. Smith, and Mr. Smith, Mr. Cole, was one of the investigators for the Committee, was he not?

A. I believe that is true.

Q. You saw him when you were there at these hearings? A. Yes, I did. [486]

* * * *

Q. "Are there any Communists to your knowledge, in Metro-Goldwyn-Mayer?"

Do you catch that, Mr. Cole?

The Witness: Yes, I do.

Q. (By Mr. Walker, Continuing): "Mr. Mayer: They have mentioned two or three writers to me several times. There is no proof about it, except they mark them as Communists, and when I look at the pictures they have written for us I can't find once where they have written something like that. Whether they think they can't get away with it in our place, or what, I can't tell you, but there are the pictures and they will speak for themselves. I have as much contempt for them as much as anybody living in this world.

"Mr. Smith: Who are these people they have named?

"Mr. Mayer: Trumbo and Lester Cole, they said. I think there was one other fellow, a third one.

"Mr. Smith: Is that Dalton Trumbo you are speaking of?

(Testimony of Lester Cole.)

“Mr. Mayer: Yes, sir.

“Mr. Smith: And his position, please?

“Mr. Mayer: He is a writer.

“Mr. Smith: And Lester Cole?

“Mr. Mayer: A writer.” [487]

Now, I direct your attention——

Mr. Katz: Will you just finish the next question and save time, Mr. Walker?

Mr. Walker: I will be very happy to.

“Mr. Smith: Have you observed any efforts on their part to get Communist propaganda into their pictures?

“Mr. Mayer: I have never heard of any.”

Now, I direct your attention to the bottom of page 73, beginning with this statement by Mr. Smith:

“Mr. Mayer, these individuals that have been mentioned as being reported to you as Communists, do you think the studios should continue to employ those individuals?

“Mr. Mayer: I have asked counsel. They claim that unless you can prove they are Communists they could hold you for damages. Saturday when I arrived here I saw in the papers a case where the high court of New York State just held you could not even say a man was a Communist sympathizer without being liable if you cannot prove it.

“The Chairman: Mr. Smith, may I ask a question right there?

“Mr. Smith: Yes, sir.

(Testimony of Lester Cole.)

The Chairman: If you were shown the Communist dues cards of any one of these three individuals, then would you continue to employ them?

"Mr. Mayer: No, sir." [488]

Did you hear that testimony by Mr. Mayer?

A. Yes, I did.

Q. Now, I will direct your attention to page 78. Mr. Cole, the record indicates (counsel will check me if this is not right) that Mr. Mayer testified before the Committee on October 20, 1947, and you did not testify until October 30, 1947, that is correct, isn't it?

A. That is correct, yes, sir.

Q. So that you had heard all of this testimony to which I have called your attention——

A. Yes, sir.

Q. ——before you took the witness stand?

A. Yes, sir.

Q. Now, turning to page 78, there is a question well towards the bottom of the page by Mr. Wood. Mr. Wood was a member of the Committee, was he not, Mr. Cole?

A. I believe that he was.

Q. Yes. The testimony is as follows:

"Mr. Wood: You were quoted"—addressing Mr. Mayer—"You were quoted somewhat in the press from that address. And I quote from one of the daily papers in New York, in which you are quoted as having said that:"

Then follows the quotation.

" "The only interpretation and understanding of

(Testimony of Lester Cole.)

communism that is worthy of belief by the American people is that it [489] threatens the way of life upon this entire planet. It threatens our fundamental concepts of human rights and liberties.' ”

That ends the quotation.

Mr. Wood speaking:

“Is that a correct quotation of the sentiment that you then expressed?

“Mr. Mayer: Yes, sir.

“Mr. Wood: And you still subscribe to it?

“Mr. Mayer: Yes, sir.

“Mr. Wood: You were quoted in this same article in the New York newspaper as having said that:”

And this is the quotation:

“‘Soviet Russia must be recognized for and plainly called exactly what it is in terms of international relationship—a powerful nation that challenges and discredits our liberty and that seeks to spread its influence to dominate the lives of men and women in smaller nations.’ ”

“Is that a correct quotation——” That is the end of the quotation. Then, Mr. Wood speaking:

“Is that a correct quotation of the sentiments that you expressed at that time?

“Mr. Mayer: Yes, sir.

“Mr. Wood: Now, I will ask you again, Mr. Mayer, if at the time you took into your employment the men that you have [490] named here who you say have now been designated as men who had attained communistic beliefs you knew that

(Testimony of Lester Cole.)

those men believed in and subscribed to a doctrine that you have thus announced, in the excerpts which I read to you, would you keep them in your employment?"

Mr. Katz: Now, just a moment. This is not only an immaterial question, but there is a material and great distinction, not merely qualitative, between what an employee hears his employer say on the subject of whether the employee with respect to his acts or conduct before a Committee is or is not going to be blacklisted, and colloquy in which an employer, in connection with an investigation, is asked for a philosophic dissertation with respect to a subject which is not in this case at all, and that is the question of what is the meaning of Communism. [491]

* * * *

Mr. Walker: Yes, your Honor. Now, I am going to read the question which I read, which evoked the objection. Otherwise the answer would have no meaning.

"Mr. Wood" (Addressing Mr. Mayer): "Now I will ask you again, Mr. Mayer, if at the time you took into your employment [492] the men that you have named here who you say have now been designated as men who had attained communistic beliefs you knew that those men believed in and subscribed to a doctrine that you have thus announced, in the excerpts which I read to you, would you keep them in your employment?"

(Testimony of Lester Cole.)

“Mr. Mayer: No, sir. I could prove it then, if they challenged me.”

* * * *

Q. Did you hear that testimony, Mr. Cole?

A. I don't remember it particularly, but I was there and if it was so read, I presume that I did, I did hear it. [493]

* * * *

Q. (By Mr. Walker): Mr. Cole, I am going to direct your attention to a conversation that you had with Mr. Mayer, in the late summer of 1947, in his office, and, of course, sometime before the Washington hearings that fall. As I recall your testimony, you testified, among other things, to the fact that you told Mr. Mayer something about the source of these Washington hearings being a man by the name of McGuinness. Am I correct in that?

A. I don't believe I said that he was the source of the Washington hearings, although I may have.

Q. Didn't you say he was the cause of these Washington hearings; that it was by reason of his activities that these hearings were going to take place?

The Court: I think that what the witness said—are you referring to a written statement?

Mr. Walker: No. I am referring to a conversation he had with Mr. Mayer in Mr. Mayer's office, in the late summer of 1947.

The Court: All right. Go ahead.

Q. (By Mr. Walker): Tell us what was said

(Testimony of Lester Cole.)

by you to Mr. Mayer about Mr. McGuinness and his relationship to the Washington hearings.

A. I told Mr. Mayer he knew Mr. McGuinness was one of the people—again, this is the substance of it—that he [494] was one of the persons who was constantly trying to bring about this kind of strife in the industry and that he had in the past actually attempted to bring members of this committee, under its previous name, to Hollywood; that he had been an opponent of mine and had used this smear technique against many of the Screen Writers Guild.

Q. And you indicated, did you not, that these hearings probably would not have been had if it hadn't been for activity of this type on the part of Mr. McGuinness and the group that was associated with him?

A. I couldn't have assured anyone of that. I only said, in my opinion, Mr. McGuinness had contributed toward it.

Q. And you indicated that you thought he made a very substantial contribution toward it, didn't you?

A. I told him he was a contributor.

Q. And you also told Mr. Mayer that Mr. McGuinness was a person who disagreed with you very thoroughly and had a personal dislike towards you?

A. Mr. McGuinness had said so and I believe, if I am not mistaken, that Mr. Mayer was aware of the fact that Mr. McGuinness had said so, and I

(Testimony of Lester Cole.)

believe he said at the time, "Yes; I know. He has spoken to me about this for years."

Q. And you indicated to Mr. Mayer that Mr. McGuinness had opposed your employment by M-G-M by reason of this antipathy that he had towards you? [495]

A. That was my general understanding; yes.

Q. I mean you so told Mr. Mayer?

A. I am not sure that I mentioned to Mr. Mayer that particular fact that he had opposed my employment at Metro-Goldwyn-Mayer.

Q. Did you not testify, or will you not now testify, that you told Mr. Mayer about the organization of the Screen Writers Guild and the strife that occurred, the controversy that occurred, between the Screen Writers Guild and another organization with which Mr. McGuinness was connected and in which he was prominent?

A. Yes; I did.

Q. And you designated, if I recall correctly, this other organization, in connection with which McGuinness was prominent, as being a company union?

A. This designation was given it by the National Labor Relations Board, I believe.

Q. But you so designated it in your conversation with Mr. Mayer, didn't you?

A. I believe that is correct.

Q. And you told Mr. Mayer, did you not, that this bitterness toward you on the part of Mr. McGuinness arose, in part, out of the conflict that had taken place in the early days of the Guild, when

(Testimony of Lester Cole.)

you were an advocate of the Guild and he was an advocate of this other organization? [496]

A. That is correct; yes, sir.

Q. Mr. McGuinness was a witness at this hearing in Washington, was he not?

A. Yes; he was.

Q. And you heard his testimony?

Mr. Margolis: That is objected to on the ground it is incompetent, irrelevant and immaterial.

The Court: I will overrule it as a preliminary question. You may answer whether you heard his testimony.

A. I really don't remember whether I was in the room at that time or not.

Q. (By Mr. Walker): If you will take the transcript there, I will direct your attention to page 135 and the pages following, which purports to be the testimony by Mr. McGuinness before the committee, and see if that refreshes your recollection as to whether or not you heard Mr. McGuinness' testimony, and at the same time that you are refreshing your recollection—or I will reserve that.

A. I really don't remember, Mr. Walker, whether I was present or not at that time.

Q. You have looked through his testimony, have you?

A. I haven't read it all. If you wish me to, I will, surely. [497]

I think that I was. I believe that I was.

Q. (By Mr. Walker): Yes. Now, you observe,

(Testimony of Lester Cole.)

do you not, Mr. Cole, that in the course of his testimony, Mr. McGuinness named a number of people whom he charged with either being Communists or having Communist sympathies, not mentioning any names?

Mr. Margolis: Objected to on the grounds it is incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Q. (By Mr. Walker): Let me ask you, Mr. Cole, if after having examined the testimony given by Mr. McGuinness and which you say you have heard——

The Witness (Addressing the court): He is speaking about all of it.

The Court: Don't talk to me. I was merely going to look at your paper. Don't talk to me. Don't talk in a whisper. Talk in a manner so everybody can hear you. You say you don't know what he is referring to?

The Witness: He is referring generally to the entire testimony.

The Court: That is right. Now, you had not finished your question, Mr. Walker?

Mr. Walker: No, sir.

The Court: Go ahead.

Q. (By Mr. Walker): You now having examined Mr. McGuinness' [498] testimony, I will ask you whether or not Mr. McGuinness, in his testimony either said that you were or that he thought that you were a Communist or a Communist sympathizer?

(Testimony of Lester Cole.)

Mr. Margolis: Objected to on the ground that it is incompetent, irrelevant and immaterial and I ask the court for an instruction to the jury on the question at this time.

The Court: Yes. The objection will be sustained and the jury instructed to disregard the implication of the question. Ladies and gentlemen of the jury, rather than repeat to you what I told you the other day, that repeatedly during the course of any trial and particularly a trial of this character, questions are asked to which objections are made, and when I have sustained the objection you are not to draw any inferences from the fact that the question was asked, what the answer would be, whether "yes" or whether "no." My ruling merely means that that is not a subject of inquiry in this lawsuit and you are not a guess as to what the answer might have been or when you discuss the matter you are not to say, "Well, the judge should have allowed that question to be answered, because we might have found out something." Remember, I warned you against that, that when I am making a ruling I am charged with the responsibility of the ruling, not the person who objected to it or the person who asks for it. I have sole responsibility for the ruling and the person who is denied under that ruling is allowed under the law an [499] exception which he can take advantage of in case after a judgment there is an appeal to a higher court. So I want you to bear that in mind and I repeated it again because

(Testimony of Lester Cole.)

I felt perhaps you may have forgotten the statement I made some days ago. All right.

Mr. Walker: All right, then, I shall put the direct question to you. Mr. Cole, isn't it a fact——

The Court: Just a moment.

Q. (By Mr. Walker, continuing): ——that nowhere in his testimony——

Mr. Katz: Just a moment, Mr. Walker.

Mr. Margolis: Just a moment, Mr. Walker.

The Court: I don't think any further question should be asked in the presence of the jury.

Mr. Walker: All right. Then I offer in evidence the testimony of Mr. McGuinness as it appears in the record.

Mr. Katz: Now, Mr. Walker, counsel, this is a breach of the ruling of the court made after full argument.

Mr. Walker: Just a minute, please.

Mr. Selvin: Just a minute. It is not a matter of fact.

The Court: Let us not make any comments. All right. Just a moment. Let us not have arguments.

(The following proceedings occurred before the court, without the hearing of the jury:)

Mr. Selvin: The purpose of this is to show Mr. McGuinness [500] did not mention him in any way.

Mr. Walker: He misunderstood this inquiry.

Mr. Selvin: The object of the examination is

(Testimony of Lester Cole.)

obvious. Mr. Cole has testified on direct to this great enmity between himself and Mr. McGuinness, and when Mr. McGuinness gets the chance to "knife" him, notwithstanding the fact he mentions a dozen other people, he does not mention Mr. Cole in any way.

Mr. Walker: No, it is a negative.

The Court: It is a negative. Why don't you ask the question while he mentioned others as being Communists, he did not name you as being one?

Mr. Selvin: That is what he started to ask and they objected.

Mr. Katz: Now, as a matter of fact, Mr. Guinness' testimony went in under privilege without any right of cross examination and certainly cannot be used for any purpose of impeaching Mr. Cole in his statement to Mr. Mayer, whether he did or did not make the statement. Now, if Mr. Mayer says that Mr. Cole didn't say this to him, that is impeachment.

The Court: Yes.

Mr. Katz: But, to put it on the basis that something else was said——

Mr. Walker: This man claims a great enmity on the part of McGuinness.

Mr. Margolis: If he didn't say it on this occasion, [501] it doesn't mean he didn't say it on other occasions.

Mr. Katz: Or that he was an enemy of his.

The Court: Well, if counsel insists on the objection I will have to sustain it. Frankly, I do not

(Testimony of Lester Cole.)

think the answer would harm you, but I would allow it to go in if I were you but, technically speaking, it is not a method of showing lack of animosity. You can bring him back here and have him show that he doesn't have animosity and you might ask him, is it a fact that because you don't have any animosity, you didn't name him?

Mr. Walker: In coming in here, they are self-serving declarations.

Mr. Katz: May we first see the part, Judge? May we just see the part you called attention to?

Mr. Walker: I gave him the whole testimony.

Mr. Katz: Offering the whole testimony. Of course we objected. We make the objection. Prove it the right way.

The Court: Well, I think technically, to determine the matter, I would rule the other way, but theoretically I think the objection is good. This is not the way to show absence of bias, but there are other ways showing absence of bias, by producing him as a witness and having Mr. Mayer deny that he ever charged him with being a Communist.

Mr. Walker: That isn't the question here.

The Court: That is what you said. [502]

Mr. Katz: They are not introducing it to show——

The Court: Let us not talk of motives.

Mr. Margolis: What is your Honor's ruling?

The Court: The ruling is that I have sus-

(Testimony of Lester Cole.)

tained the objection to the offer of the testimony of McGuinness.

Mr. Walker: I want to offer the testimony itself.

The Court: The testimony itself?

Mr. Walker: I want to offer it.

The Court: I think you started to offer it.

Mr. Walker: I started to offer it, yes.

The Court: Well, offer it and identify it.

Mr. Walker: Yes.

Mr. Selvin: It is offered with the understanding that the testimony, we contend shows that Mr. Cole was not mentioned in any way in that testimony.

The Court: All right. It is a negative. And I will sustain the objection on that ground, but you make the offer in open court.

(Thereupon further proceedings were had before the court and the jury, within the hearing of the court and jury, as follows, to wit:)

Mr. Walker: I will complete the offer that I started to make: I offer in evidence the testimony of Mr. McGuinness as appears in the publication that has been identified as a correct copy of the testimony taken before the committee. It [503] begins at page 135 and continues through pages 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, and down to somewhat beyond the middle of page 152. [504]

The Court: All right.

(Testimony of Lester Cole.)

Mr. Walker: And for the purposes indicated to your Honor.

The Court: That is right. All right. You better repeat the objection.

Mr. Katz: Our objection is that it is incompetent, irrelevant and immaterial.

The Court: Well, may I state generally that I have examined the testimony—that I have glanced at the testimony and that testimony does not relate specifically to Mr. Cole at Washington. Am I correct on that statement?

Mr. Katz: Yes.

The Court: The testimony sought to be introduced.

Mr. Katz: That it does not relate to Mr. Cole.

The Court: That it does not mention his name.

Mr. Katz: That is correct.

The Court: All right, the objection will be sustained and the offer rejected. I think I intended to say that I have examined it. But remember the admonition I have given you just a moment ago. I am of the view that this testimony does not bear upon any phases of the case and does not bear upon anything that Mr. Cole may have said to Mr. Mayer or from the stand here in regard to Mr. McGuinness. For that reason I have sustained the objection to it.

* * * *

[505]

Q. (By Mr. Walker): In your testimony, in response to the questions of your counsel, Mr. Cole, and when you were telling about the statement which you had prepared and which the committee did not permit you to read, you were asked whether or not

(Testimony of Lester Cole.)

other witnesses had handed up to the chairman, I assume, prepared statements? A. Yes, sir.

Q. And you mentioned as persons who had done that, Mr. Warner, Mr. Mayer, Mr. McNutt and Mr. Johnston. What other people had prepared and handed up statements to the committee or to the chairman of the committee?

A. Now, I am not sure that every statement which was read was first handed up. I don't know whether J. Parnell Thomas requested that of all of the witnesses, but I do know that a number of statements were read at that time and at the time that the questions were asked me, those were the ones that I seem to remember.

Q. Well, as a matter of fact, statements were also handed to the committee—I am not dealing with the question now as to whether they were read or not—by Mr. Lawson, Mr. Trumbo, Mr. Maltz, Mr. Bessie, Mr. Biberman, Mr. Ornitz, Mr. Dmytryk, Mr. Scott and Mr. Lardner, were there not?

A. Yes, I believe they were.

Q. And do you recall which of those statements were [507] read?

A. I believe that Mr. Maltz's statement was read and a portion of Mr. Bessie's.

Q. And all of Mr. Bessie's statement was put in the record, was it not?

A. I really don't know, sir. [508]

Q. (By Mr. Walker): Calling your attention again to your testimony before the Committee, which you will find beginning at page 486, I direct your attention to the following—it appears to be about

(Testimony of Lester Cole.)

one-third up from the bottom of the page and begins with a question by Mr. Stripling, page 487.

A. Yes, sir.

Q. The question is, "Mr. Stripling: And the question before you is are you a member of the Screen Writers' Guild?"

"Mr. Cole: I understand the question and I think I know how I can answer it to the satisfaction of the committee. I wish I would be permitted to do so.

"The Chairman: Can't you answer the question?"

"Mr. Cole: You wouldn't permit me to read my statement and the question is answered in my statement."

You had intended, Mr. Cole, had you not, that you would answer this question as you answered it through the statement which you had prepared and which you requested to read before the committee?

A. I am sorry; I really don't understand that.

Mr. Walker: Will you read it, Mr. Reporter? And if you think you don't understand it, I will try to clarify it.

(Question read by the reporter.)

A. That was my intention; yes. [509]

Q. And the statement which you had prepared was, in substance and effect, the statement which you intended to make, if you had been permitted to complete it, in answer to the question are you now or have you ever been a member of the Communist Party?

A. No, sir; it was not. It wasn't meant to answer

(Testimony of Lester Cole.)

either of those questions. It was meant to make a preliminary statement to the committee on what I felt was the purposes of the hearings.

Q. When was this statement prepared, Mr. Cole?

A. To the best of my recollection, it was prepared the evening before I knew I was to testify, that is, I would say I believe it was prepared on the 29th of October.

Q. Had you made any drafts of it before that?

A. I believe I had thought about it but I am not sure whether I did or not.

Q. Do you remember when you prepared the first draft of it?

A. I would say within a day or so of that time, that is, the time for my appearance, on what I felt was the necessity for making a statement before the committee. I would say it was a day or two prior to my appearance.

Q. And had you submitted it to anyone before or after it was prepared?

A. I spoke to my counsel about it. [510]

Q. Did you submit it to anyone else?

A. I don't remember. I don't think so.

Q. You didn't show it to any of the gentlemen whom I have just named as other people who had prepared statements for presentation to the committee?

A. I may have. I don't remember. It is quite possible.

Q. Had you discussed with them, or any of them, the proposed contents of the statement?

A. No; I don't think I did. I felt that I wanted

(Testimony of Lester Cole.)

to make a personal statement of my understanding of this situation.

The Court: Did you prepare it yourself or dictate it? Did you write it?

A. I wrote it myself, sir.

The Court: On the typewriter?

A. Yes; that is correct.

Q. (By Mr. Walker): Mr. Cole, as I understand you then, this statement was put into final form on the evening of the 29th of October, 1947, which was the night preceding the day upon which you were called and upon which you knew you would be called to the witness stand?

A. The day before; sometime during the day. I won't say the evening or try to set the time. I don't remember. [511]

Q. At the time that you prepared this statement, you had heard the testimony that had been given at the hearing by Mr. Lawson, Mr. Trumbo, Mr. Maltz, Mr. Bessie, Mr. Biberman, Mr. Ornitz, Mr. Dmytryk, Mr. Scott and Mr. Lardner? Isn't that a fact.

Mr. Margolis: We object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Yes; I did.

Q. (By Mr. Walker): And you knew, therefore, from hearing that testimony, the type of question that you might expect to have asked of you when you took the stand, is that not correct?

Mr. Margolis: I object to that as incompetent, irrelevant and immaterial and an attempt to get indirectly what cannot be gotten directly.

(Testimony of Lester Cole.)

A. No, sir; no one did.

Q. So that, as far as any knowledge that you had, conformable to the knowledge which you already had, you expected to go on the witness stand the following day, the day following the day on which you prepared this statement, is that correct?

A. Generally; yes; I suppose I did.

Q. Isn't it specifically correct?

A. Because I had a feeling that the hearings might end as they did, abruptly, I was prepared to go on the stand if I was called, but there was no certain knowledge I would go on.

Q. You prepared the statement to meet the probability that you would go on the witness stand the next day?

A. That is what I said; that I considered it probable.

Q. And it was prepared in connection with the fact that you expected to testify and that you expected to present this statement to the committee?

A. If I were called upon.

Q. And you expected to be called upon?

A. That was the probability.

Q. There was nothing to indicate the contrary except your thought or opinion that the hearings were going badly and, therefore, they might be discontinued?

A. That was my feeling, very strong feeling.

Q. That was the only thing you had upon which you now base your statement that you thought it was possible that the hearings might be discontinued before you took the witness stand?

(Testimony of Lester Cole.)

A. That is correct; that is right, sir.

Q. Did I understand you to say this this statement is not the answer that you intended to make to the question addressed to you by the committee, as to whether or not you were a member of the Screen Writers' Guild?

Mr. Margolis: That is ambiguous.

Mr. Kenny: It has already been asked and answered.

A. I will repeat my answer.

The Court: Yes; go ahead.

A. As best I remember it. I reply to your question that this statement was prepared to be read in advance of any question asked by the committee, in which I stated my position in regard to the committee, upon appearing before it, and this statement was not in answer to any question that the committee might ask me.

Q. (By Mr. Walker): I understand it was not in answer to any question that the committee might ask you but I am suggesting to you, Mr. Cole, that it was prepared and that it contains the answer that you intended to give to the committee in response to the committee's question, "Are you a member of the Screen Writers' Guild"? Isn't that the [516] case?

A. Mr. Walker, the answers I intended to give to the committee I gave to the committee and they are in my testimony in the record.

Q. And those are the answers that you intended to give to the committee?

(Testimony of Lester Cole.)

answers the question, "Are you a member of the Screen Writers' Guild?"

A. Now, I get the point. Now, Mr. Walker, I see what you mean. I am sorry. It was really rather round-about and I really didn't get it until just this moment. I say here, "I was working in Hollywood in 1933 when screen writers, faced with an arbitrary fifty per cent cut in salaries, formed the Screen Writers' Guild for the purpose of collective bargaining."

I believe that is my testimony where I said, "You wouldn't permit me to read my statement and the question is answered in my statement," that is what I was referring to.

The Court: All right.

Q. (By Mr. Walker): In other words, the thing that you are referring to is the part that you have just quoted to us?

A. I believe that was it, yes. That was a reference to the Screen Writers' Guild and that is what I believe was—is the way I stated it on the witness stand there at the time.

* * * *

[521]

Q. (By Mr. Walker): Mr. Cole, do you recall giving the following testimony in the course of this trial in the direct examination, being page 457 of the reporter's transcript, referring to your return from Washington after the hearing before the Un-American Activities Committee? The question was asked you, "What work did you return to do?" And your answer was, "I returned on the assignment which I had been working on prior to my departure

(Testimony of Lester Cole.)

for Washington and for a period of the time that I was there, "Zapata".

"Q. And you continued to work every day on "Zapata", did you? A. Yes; I did.

"Q. And that was in connection with the preparation for the screen of "Zapata"?

"A. That is correct." [531]

You recall giving that testimony, do you?

A. Yes; I do.

Q. Isn't it a fact, Mr. Cole, that at or about the time that you returned from Washington work was discontinued on "Zapata" because of the fact that a decision had not been reached as to whether or not "Zapata" would be made?

A. No, sir; not to my knowledge. All that I know is that in connection with my producer, Mr. Cummings, upon my return, he informed me that the question of production and the costs of production were being discussed, and that we held numerous conferences and discussed and worked on ways and means in which to bring about a lower budget, and that was to try to think of ways of writing this picture wherein it would not cost as much as was originally planned, and that the studio, from the knowledge which I received from Mr. Cummings, intended and wanted to make this picture if it could be made at a certain cost, and we continued to work on ways and means of working out the story material so that it would come within a lower production budget.

Q. Weren't you advised that they were awaiting a decision by Mr. Katz, whom you have identified as one of the production executives of MGM, as to

(Testimony of Lester Cole.)

whether or not you were going ahead with that production?

A. Yes, sir; but that didn't deter Mr. Cummings from asking or requesting that I continue to work on it so that we [532] would be that much ahead in the event that the decision was that way.

Q. Would it refresh your recollection if you were told that, in the records of MGM, showing your different assignments, it appears that you were assigned to "Viva Zapata" and that it appears that between the 12th of November, after the 12th of November, it is marked that you are available?

A. Well, sir, I don't remember being informed that I was available at any time.

Q. Do you recall having your deposition taken—

A. Yes, sir.

Q. —by Mr. Selvin? A. Yes; I do.

Q. I am going to hand you a copy of your deposition and I am going to ask you to look at page 175, beginning at line 26, and ask you read down to line 24 on page 176. A. Yes, sir.

Q. Now, the deposition that you have before you, Mr. Cole, was a deposition which was taken on September 10, 1948, is that correct?

A. Yes; it is.

Q. And, before your deposition was given, you were sworn by the notary public to testify truly in connection with the questions that would be asked of you and were asked of you? [533]

A. That is correct.

Q. Mr. Selvin was present and I was present at the deposition, as attorneys?

(Testimony of Lester Cole.)

A. That is right.

Q. And your counsel, Mr. Katz, and Mr. Margolis and Mr. Kenny were also present, or some of them were present, all through the hearing?

A. That is right.

Mr. Walker: I should like to read the portion of the deposition of Mr. Cole which he has identified, beginning at line 26 on page 175.

“Q. (By Mr. Selvin): Now, after you returned from Washington and up to the time of your suspension, what work, if any, did you do at Loew’s?

“A. I was still assigned to the story known as “Zapata” and we were waiting at that time for a conference with Mr. Katz, who was the executive producer.

“Q. That is Sam Katz?

“A. Mr. Sam Katz—waiting on whether or not to go ahead with the screen play.

“Q. So that your work, then, consisted of waiting for a decision in that regard?

“A. Yes. But during that period Mr. Cummings and I had discussed the treatment and methods of putting it into screen play form. We had a number of conferences. I did some [534] continuing work in preparation because he felt confident that we were going to go ahead with this assignment.” Now, does that refresh your recollection, Mr. Cole, that, as a matter of fact you were waiting for a decision from Mr. Katz as to whether or not you should go ahead with the screen play?

A. Mr. Walker, I think that the next four lines or five lines of that deposition give a much better

(Testimony of Lester Cole.)

picture of the actual nature of the work at that time.

Q. I shall be happy to read it to you but I will ask you to answer my question in the meantime.

Will you repeat the question, please, Mr. Reporter?

(Question read by the reporter.)

A. The decision to go ahead with the screen play, as I tried to explain moments ago, had nothing to do with the continuation of the work to go ahead with the preparation of the screen play, which my producer wished me to do, and which I did.

Mr. Walker: Now, may it please the court, I move to strike the answer of the witness as not responsive to the question.

The Court: Read the question and the answer.

(Question and answer read by the reporter.)

Mr. Katz: The answer is in accordance with the question.

The Court: I think it is responsive. In other words, what he says is the work he did had nothing to do with the [535] determination of Mr. Katz. He didn't use Mr. Katz' name. I will let it stand. But I will ask you this, Mr. Cole. Will you tie that answer to Mr. Katz and relate it more directly to the question that Mr. Walker put to you?

A. Yes, your Honor. But may I just explain this, that the question involves certain technicalities in the work of the screen play itself, and that the decision to wait on the screen play doesn't mean that any amount of work cannot be done in preparation for it.

(Testimony of Lester Cole.)

The Court: That isn't the question. The question is what was done. And what he asked you is this: Isn't it a fact that you were waiting for the determination of certain matters by Mr. Katz?

Mr. Walker: Your Honor, I am asking him one question only and that is whether or not this testimony which he gave at the time of his deposition refreshed his recollection to the effect that he was waiting for a decision from Mr. Katz as to whether or not they would go ahead with the screen play.

The Court: That you may answer more directly and then incorporate into it the explanation already given, or any other explanation.

A. I see, your Honor.

Mr. Walker: Just a moment. We have gotten a long way from the testimony that evoked the question. And I will call the witness' attention to the testimony that he gave on his [536] deposition in this regard and then I will ask him the question.

The Court: I don't think it is necessary to repeat unless the witness doesn't remember the question. Can you answer the question?

A. Yes, sir; I can.

The Court: All right; answer it.

A. Yes. I was awaiting a decision by Mr. Katz on whether or not the company would do the screen play.

The Court: All right; period. Stop right there. Do you want to explain that?

A. Yes, sir; I would like to.

The Court: Go ahead.

A. But in the meantime, waiting for that decision,

(Testimony of Lester Cole.)

Mr. Cummings, my producer, requested me and I complied with his request to continue with the material which would go into the screen play if the decision were made to go ahead with it.

The Court: All right.

Q. (By Mr. Walker): Now, Mr. Cole, to meet your request, I will read this portion of your testimony at the time of taking your deposition, after you had testified that you did some continuing work in preparation because Mr. Cummings felt confident that they were going ahead with the assignment. You were asked by Mr. Selvin, "What was the nature of the work that you did? [537]

"A. On the development of characters, revision of certain situations. There were notes, mainly going back over the book itself, and extracting certain incidents which might be integrated into the finished material. This, as I previously described, was a very big job, and it was still in quite rough form at the time the notice of suspension came through."

Q. In other words, this was still quite a rough form, on December 2, 1947, when you received your notice of suspension?

A. Well, it was in form sort of narrative treatment of the story but rough as described here. I meant it was far from being a finished screen play.

Mr. Walker: All right.

Q. You knew that it had not been determined when you came back from Washington, you knew it had not been determined whether or not the company, Loew's, Incorporated, was going ahead with this production, that is a fact, isn't it?

(Testimony of Lester Cole.)

A. Yes, sir.

Q. And you knew that a decision in regard to that matter had not been made by Mr. Sam Katz, that is correct, isn't it? A. That is correct, sir.

Q. All right. As a matter of fact, no decision upon that matter had been made up to the time that you were notified of your suspension, on December 2nd, 1947, is that correct? A. Not that I know of.

Q. As far as you know?

A. That is correct, sir.

Q. And as far as you know, no decision had been reached by Mr. Sam Katz, or by Loew's, Incorporated, on December 2nd, as to whether or not you were to go ahead with the screen play?

A. I wasn't informed of anything except to keep working as I was doing, in preparation for such a decision.

Q. Yes, but you knew that a decision had to be made and it had not been made, didn't you?

A. Well, Mr. Walker, this was a common occurrence in [539] the studios to work not only for a month but sometimes a year on something and decision as to whether it is produced or not is not made until it is completed.

Mr. Walker: I ask that be stricken as not responsive to my question.

The Court: Yes. I think I will strike that out. Read the question.

(Pending question read by the reporter.)

A. I was not informed of any decision being made.

(Testimony of Lester Cole.)

Q. (By Mr. Walker): As far as you know, no decision had been made as to whether you were to go ahead with the screen play?

A. That is true.

Q. That was true after you came back from Washington and it was true up to the time that you received your notice of suspension?

A. Yes, that is true.

Q. The work that you did was not the intensive work that you would have done had that decision been made by Mr. Katz that was to go ahead with the screen play?

A. Yes, it was, yes, sir. There are periods—and I think this requires an explanation, sir, if you will permit me: There are periods in the course of a job of this magnitude which would have taken perhaps a year to complete, in which there are periods of more intensive work [540] and of less intensive work, but that was not in relation to the particular portion I was in at that time. I would like to say, Mr. Walker, that there are times when merely holding conferences are much more intensive than the actual writing of the script itself.

Q. Do you remember when you were originally assigned to "Zapata"?

A. I do not recall the exact date, no.

Mr. Walker: Now, Mr. Cole, I don't want to cut you off from any proper explanation and I am sure that the court would insist that you be given an opportunity to explain anything that requires explanation, but, except when your answer requires an explanation, I would appreciate your not going

(Testimony of Lester Cole.)

on, and leave it to your counsel to bring out what your counsel deem to be additional matters of importance.

The Court: Well, Mr. Walker, will you kindly let me give admonitions to the witness rather than yourself?

Mr. Walker: I so request the court to give the admonition.

The Court: What should have been requested, what he has already done, stands as the court's admonition to you. Let us not depart too much from the decorum required in this court by the nature of this case.

Q. (By Mr. Walker): You recall telling us about a number of conversations that you had at or about the time [541] that the revision of your contract was under consideration? A. Yes, I do.

Q. And you recall, of course, the testimony of your agent, Mr. Willner, in regards to conversations that transpired? A. Yes, sir.

Q. At or about the same time? A. Yes.

Q. Now, there is some indefiniteness in regard to the times when those conversations took place and I should like to fix them as nearly as I can. I would like to direct your attention—first I will hand these to your counsel.

(Mr. Walker hands documents to Mr. Kenny and Mr. Katz.)

I withdraw that question, Mr. Reporter. I don't think it was completed, anyway.

Let me ask you, if it is not your best recollection

(Testimony of Lester Cole.)

that the substantive terms of the revision of your contract were agreed upon with Mr. Thau, Mr. Ben Thau, which occurred on August 15th or about August 15, 1947?

A. I couldn't be sure of the date, sir.

Q. Well, can you tell us, as nearly as you can and to your best recollection, when the conversation occurred and with whom, and at which the substantive provisions of the revision of your contract were agreed on?

A. I don't recall that I had any such conversation with any of the executives of Metro. I believe all of that business [542] was transacted by my agent, sir, to the best of my memory.

I do remember this: That on the day I received my subpoena, immediately following that, that the final terms to which I agreed were shown to me by Mr. Hendrickson; that was after I was handed the subpoena and the marshal left the room; and that the final matters which had not been agreed upon, which were in relation to whether or not the vacation and layoff period could be consecutive within the two years had been discussed between my agent and the executives there and in reading that finally in Mr. Hendrickson's office on that day, I agreed that they are now satisfactory and it was after that the contracts were signed. [543]

Q. (By Mr. Walker): All right. Now, I call your attention to your testimony of a conversation had with Mr. Sam Katz in which you stated, and this is the first conversation that you related in point of time, in regard to the revision of your contract.

(Testimony of Lester Cole.)

I am referring to page 363, line 3, where Mr. Cole testified as follows—

You won't find it in there, Mr. Cole. That is your deposition.

The Witness: Oh, I beg your pardon.

Mr. Walker: This is testimony that you gave in court.

The Witness: I see.

Mr. Walker: Q. (Continuing): "I recalled to Mr. Katz, Mr. Sam Katz, that, at the time that I signed my contract in 1945, there had been a disagreement and misunderstanding as to the terms of that contract." Now, you do recall—

A. Yes, I do.

Q. —a conversation with Mr. Katz?

A. Yes, I do.

Q. In which you broached the proposition that in 1945 there had been a disagreement and misunderstanding as to the terms of the contract?

A. That is correct, sir.

Q. All right. Now, can you give us approximately the date when that conversation with Mr. Katz occurred? I am speaking now of the conversation which you had with him, not [544] at the time your contract was originally signed, but subsequently, when you called his attention to what you claimed was a misunderstanding.

A. Well, sir, I think that that date could be fixed exactly if we could find the actual date on which Loew's, Incorporated, sent the contract to me, because it was prior to my signing the contract and it was in that conversation that he asked me to sign it

(Testimony of Lester Cole.)

in the terms in which it was written, wherein he said that if within a year my work warranted, the contract would be revised upwards, so that the date on which that conversation took place was prior to my placing my signature on the original term contract.

Q. I think we have to get straightened out. I don't think you understand my question.

At the time or at about the time you signed your original contract, back in 1945, you had a conversation with Sam Katz, did you not?

A. Yes, sir.

Q. Now, this conversation was in 1945?

A. That is right.

Q. All right, and during the course of that conversation, you indicated to Mr. Katz that the terms of the contract as they were now submitted to you were not the terms that you understood were going to be in the contract?

A. Yes, sir, that is right. [545]

Q. That is right? A. That is right.

Q. That was in 1945? A. Yes, sir.

Q. And it was at that time that Mr. Katz had promised you that if your work was satisfactory, that there would be a revision of your contract?

A. Within a year.

Q. Within a year? A. That is correct.

Q. Within a year, but that conversation occurred in 1945, about the time you signed up the term contract? A. That is right, sir, yes.

Q. All right. Now, under questioning by your counsel the other day, you were asked about any

(Testimony of Lester Cole.)

conversations that occurred in regard to the revision of your contract sometime in 1947, did he?

A. Yes.

Q. So we are now away from 1945 and down into 1947. And in response to a question as to the persons with whom you talked in 1947, you testified to a conversation had with Mr. Sam Katz, and that is your testimony which I read to you, and you said, "I recalled to Mr. Katz, that, at the time that I signed my contract in 1945, there had been a disagreement and misunderstanding as to the terms of that contract." [546]

Now, it is that conversation that I am talking to you about.

The Witness: I see.

Mr. Walker: And it is that conversation as to which I am trying to fix the time.

A. I see. Well, sir, to the best of my ability to recollect, it would have been in the spring, sometime in the spring of 1947. I place the date because I recall that a year had passed and then sometime after the year from the signing of the contract, and that the promise to revise the contract upward had not been forthcoming within the time, and therefore, I brought it to his attention at that time. So it was over a year, after the first conversation with Mr. Katz took place.

Q. And you remember, do you not, Mr. Cole, that the original contract, the original term contract, was signed in December of 1945?

A. I believe—well, sir, pardon me just a moment. I know that the date of the contract was December,

(Testimony of Lester Cole.)

but I know that at that time I was down in Mexico helping in the rewriting and the writing of the production "Fiesta", that I was there for two or three weeks and perhaps longer, and whether or not I signed it during that period or upon my return or after the actual date of my signature, it was within a few days of that time. [547]

Q. You signed it in December, 1945?

A. Or in January.

Q. Or in January, 1946?

A. Or in January of 1946, that is right, sir.

Q. So that you, sometime after the lapse of a year, approached Mr. Katz and reminded him of the promise—

A. Yes, sir.

Q. —that he had made to you?

A. That is right.

Q. And Mr. Katz told you he would look into the situation—

A. That is right.

Q. —take it up?

A. Yes, sir, that is correct.

Q. Now, that is the substance of the conversation which you had with Mr. Katz at that time?

A. We spoke about the contract and about this promise, yes, sir.

Q. You were present when Mr. Willner testified, were you not?

A. Yes, sir, I was.

Q. And you heard his testimony?

A. Yes, sir.

Q. Do you recall that—

Counsel, I am looking at page 301 of the transcript of [548] his testimony.

Mr. Katz: Thank you.

(Testimony of Lester Cole.)

Q. (By Mr. Walker): Do you recall that you testified that, as your agent, he had a conversation in the spring of 1947 with Mr. Mannix?

A. Yes, I do recall that.

Q. (Continuing): Who was the general manager of the studio, and that he testified that he was there for the purpose of trying to improve the terms of your contract?

A. Yes, sir. I remember that.

Q. Now, do you recall this testimony by Mr. Willner: "I said that Mr. Cole had told me that he was very concerned about the fact that possibly the studio was not improving his position at that time because of the fact there were many articles and editorials in the local trade papers, namely, the Hollywood Reporter, and that possibly the studio executives were taking that into consideration in not improving Mr. Cole's position."

Do you recall that he so testified?

A. Yes, I do.

Q. Now, Mr. Willner says that you had told him that you were much concerned, that the studio might not be improving your position because of these articles and editorials that were appearing in the Hollywood Reporter and that that might be affecting the attitude of the studios. Had you [549] so told him?

A. I believe that we discussed that matter, yes, sir.

Q. I mean you so told Mr. Willner, that that was a matter of concern to you?

(Testimony of Lester Cole.)

A. As to the studio's position in respect to me, yes, sir.

Q. Yes. Well, you thought it was a matter of concern to you because of the effect that it might be having upon the revision of your contract?

A. Yes, sir.

Mr. Walker: You understand, Mr. Cole, I am not trying to get you to say that it was a matter of concern to you that the articles were appearing in the *Hollywood Reporter*.

I am only trying to develop the fact, if it is a fact, that you had told Mr. Willner that you were concerned because you thought that these articles that were appearing in the *Hollywood Reporter* might be adversely affecting the studio's revision of your contract? A. Yes, sir, that is correct.

Q. Yes. A. I understand you.

Q. And that you had told Mr. Willner in substance or in effect?

A. That I would like to find out whether or not the studio was concerned about this. [550]

Q. That is right, yes. Now, I assume that Mr. Willner told you in substance and in effect of his conversation with Mr. Mannix, he reported back to you? A. I am sure he did, sir.

Q. And you think he would have reported it to you accurately?

A. Well, he was my agent. He was being paid to do so, so I presume that he did.

Q. Now, Mr. Cole, you did not testify, but Mr. Willner did testify to a conversation which occurred subsequently, between him and Mr. Ben Thau, and

(Testimony of Lester Cole.)

I direct your attention to the testimony that Mr. Willner gave in that regard.

Mr. Katz: Where are you reading from?

Mr. Walker: I am referring now to page 303 of the transcript, Mr. Willner's wording, that you may read yourself. After relating the conversation by Mr. Mannix, he said, "We left with Mr. Mannix saying he would see what could be done.

"Q. Did you then carry on negotiations looking to the betterment of Mr. Cole's then existing contract? A. For some months I did.

"Q. And did you see a Mr. Benjamin Thau?

"A. I did."

Then, there is a statement as to Mr. Thau's position with the defendant Loew's, Incorporated.

"Q. (By Mr. Katz): Referring to the conversation with Mr. [551] Thau, "That was several months, was it, after, or sometime after, the conversation with Mr. Mannix?

"A. Yes; it was about a week afterwards. I would say it was in the latter part of April, 1947."

Now, how does that conform to your recollection, Mr. Cole, of the sequence of these conversations, remembering that you had the first arrangement, conversation with Mr. Sam Katz and that Mr. Willner on your behalf had a conversation with Mr. Mannix and that about a week later, on your behalf Mr. Willner had a conversation with Mr. Thau which he says was in the latter part of April, 1947? Would that conform with your recollection?

A. Well, Mr. Walker, I would like to say this, that I believe that the negotiations started sometime

(Testimony of Lester Cole.)

in the winter or late winter or early spring of 1947. I was extremely busy. I had instructed my agent to bring these negotiations to a conclusion and they started at that time and all I know is that they finished finally on the 22nd of September. I know that he had any number of conversations with all of these executives, at various times, and if in the course of my duties he called up and said he was going to see Mr. Thau or "I saw Mr. Mannix," I probably said to him, "Well, how is it coming," and he said, "We are negotiating," and I said, "Swell."

I would like to accommodate you on these dates, but I [552] really don't think they are in my mind at all. I know that they occurred in this period.

Mr. Walker: I want to get it as nearly as I can, Mr. Cole.

The Witness: I would like to help you, sir, if I can.

Mr. Walker: And I will appreciate your cooperation.

The Witness: Surely.

Q. (By Mr. Walker): You do know, of course, because you had a conversation yourself, of a conversation with Mr. Katz? A. Yes, sir.

Q. And that apparently was the opening gun, if we may say so, in the effort to obtain this revision of your contract?

A. That was my first action in relation to it, yes, sir.

Q. Yes. And you do know that the matter was afterwards taken up with Mr. Mannix?

(Testimony of Lester Cole.)

A. Yes, sir, I know that, too, of course.

Q. All right. Now, can you give us some idea about the lapse of time—this was a matter with which you were much concerned—the lapse of time between the original conversation between Mr. Katz and you, and the time that the matter was taken up with Mr. Mannix? [553]

A. Well, sir, I couldn't give you that. I can only give you what seems somewhat clear to me and that is my original conversation with Mr. Katz and then my conversation with Mr. Thau which I referred to in my testimony, which I know took place following the secret hearings of the sub-committee of the Un-American Activities Committee in Hollywood, which was in, I believe, May or June, and I know my conversation with him took place after that but I could not tell you the dates on which Mr. Willner, or the number of times, saw Mr. Mannix or Mr. Thau. I know this conversation took place prior to my interview with Mr. Thau.

Q. It took place prior to your interview with Mr. Thau? A. That is correct.

Q. Now, there was an interview which you had with Mr. Thau, which you had with Mr. Thau?

A. Yes, sir.

Q. And that, you tell us now, was a conversation which took place after the closed hearing of the Un-American Activities Committee here in Los Angeles? A. That is correct, sir.

Q. And the time of that hearing has been fixed here in court, Mr. Cole, as being in the very early part of June, 1947— A. Yes.

(Testimony of Lester Cole.)

Q. —if that assists you in the matter of getting [554] your dates fixed.

A. I remember it to be about that time.

Q. You were present at this meeting. I am going to call your attention to Mr. Willner's testimony and, also, to your own in regard to it, page 305, gentlemen. Mr. Willner fixes it as being probably in the latter part of June, 1947, this conversation with Mr. Thau, and perhaps you were not present at that meeting because of the fact that the suggestion was made, as appears by Mr. Willner's testimony, that the matter be taken up with a Mr. Vetluggin. Were you present at a conversation when that suggestion was made?

A. No, sir.

Q. And do you know what occurred at the conversation between Mr. Willner and Mr. Vetluggin? Did Mr. Willner report that to you?

A. I believe he did. I believe that I saw Mr. Vetluggin right at that time with Mr. Willner.

Q. Now, I am going to read to you what Mr. Willner said with reference to that discussion, page 307.

“I told Mr. Vetluggin Mr. Thau had asked me to come down to see him to enlist Mr. Vetluggin's help in convincing the executives that an improvement in his contract was justified. Mr. Vetluggin said there was no doubt in his mind whatsoever that an adjustment of the contract was justified. I asked Mr. Vetluggin if he and the other executives—and I have talked [555] to many executives about the adjustment of his contract—if they all felt that his contract was justified, why the big delay. And I also reminded

(Testimony of Lester Cole.)

Mr. Vetluggin or told him at the very same time there was an editorial and stories which were appearing in regard to Mr. Cole being a Communist, if I recall, an editorial by Mr. Billy Wilkerson of the *Hollywood Reporter*, in which Mr. Wilkerson said Lester Cole was a Communist; that he should be driven from the industry or he should be blacklisted. There were many such stories and articles which appeared in the *Reporter*. There was one which concerned Mr. Cole and myself greatly, in which I think it was Mr. Thomas made the statement that all of these writers and supposed Reds, including Mr. Cole, would be driven from the industry within 60 days. I asked Mr. Vetluggin pointblank if these articles, these editorials and these rumors, which were current in the studio, were having their effect on the fact that this contract was not being negotiated, and Mr. Vetluggin told me that the studio policy was such that they were not concerned with what a writer did as far as politics were concerned. I then suggested to Mr. Vetluggin that, since Mr. Cole was so worried about this, he call Mr. Cole in."

Then occurred a conversation between Mr. Vetluggin, Mr. Willner and yourself. When you came into the conversation, were you told what had transpired before you came into the [556] conversation?

A. Yes; I was.

Q. And it was substantially as Mr. Willner has recited it?

A. That is correct, sir; yes, sir.

Q. It was subsequent to that that there was another conversation between Mr. Willner and Mr.

(Testimony of Lester Cole.)

Thau. Do you remember whether or not you participated in that conversation?

A. I only remember participating in one conversation with Mr. Willner and Mr. Thau. I don't know whether you are referring to that one, Mr. Walker. If you are, I did, and, if you are not, I didn't.

Q. Here is, in substance, the conversation with Mr. Thau—I am referring to page 309, gentlemen.

* * * *

[557]

Q. (By Mr. Walker): Mr. Willner testifies in regard to this conversation with Mr. Thau, in which he says it was about a week after his discussion with Mr. Vetluggin. You will recall that there was a conversation, which took place in the latter part of June, between Mr. Willner and Mr. Thau, at which he was asked to see Mr. Vetluggin?

A. Yes, sir.

Q. Then, very shortly after that, a conversation with Mr. Vetluggin, and now another conversation with Mr. Thau.

A. Yes.

Q. So that in this conversation Mr. Vetluggin says it occurred about a week afterwards, so that we are now down, in all probability, to the early part of July—

A. Excuse me. Did you say Mr. Vetluggin said that occurred?

Q. No. Mr. Willner said that it occurred about a week later. So that we are now down into the early part of [558] July with this conversation with Mr. Thau. Mr. Willner testified, "There were some more negotiations. Mr. Thau said that the fact that the funds for the studio were being frozen in England

(Testimony of Lester Cole.)

and that the income from England was stopping made it very difficult for the studio to adjust a contract; that these things had to be taken up directly with the president of the studio, Mr. Nicholas Schenck and, in his opinion, it was better to delay the matter another couple of weeks, when he thought Mr. Schenck was coming to town."

Willner speaking, "I then mentioned the articles to Mr. Thau which were appearing daily in the *Hollywood Reporter* and editorials by Mr. Wilkerson and suggested, since Mr. Cole was so concerned about it and felt that the studio was probably stalling about his politics, that he call Mr. Cole in and explain the fact that there was no such thing; that they were, first, waiting on the situation to clear up as far as England was concerned and, secondly, waiting for Mr. Schenck to come to Hollywood.

"Q. Did you suggest to Mr. Thau that he call Mr. Cole down? A. I did.

"Q. Was there then a meeting with Mr. Cole and Mr. Thau?

"A. A meeting was arranged for the following morning at 11:00 o'clock." [559]

And then it goes on to the conversation which took place at 11:00 o'clock the next morning, at which Mr. Willner says you were present. And it is your recollection that about that time you did attend a meeting with Mr. Thau, is it?

A. I am sorry, sir, but I can't place the exact date of this. I don't know whether it was a week later or any length of time later than any previous con-

(Testimony of Lester Cole.)

versation that he had with Mr. Thau, because I don't know when he had that conversation.

Q. Do you recall, Mr. Cole, a meeting being arranged by Mr. Thau with you, at the suggestion of Mr. Willner, to your knowledge, at the suggestion of Mr. Willner? A. Very well.

Q. Now, let's see if this is the conversation. Mr. Willner says in regard to that conversation which transpired the next morning, and it would still be some time early in July, according to Mr. Willner, "Mr. Thau was very friendly to Mr. Cole when he came in. I will try to remember his exact words. He said, 'I hear you are worried, Lester.' And Lester said, 'Yes; I am. These negotiations for my contract have been going on now for three months or more and nothing has happened on it. I would like to know, and I want to put this question to you very bluntly and forthrightly, "Since I have been accused of being a Communist in the press, [560] in the trade papers and on the lot, and I have heard rumors that Mr. McGuinness and others here are anxious to have me taken off of the lot, I feel that especially now, since I am very much in demand in other studios, if it is the opinion of this studio that they are not going to adjust my contract, I would like to ask the studio to release me from my contract. I think this is only fair and I think you should see this as a fair man.'

"Mr. Thau's answer was, 'No such thing. We do not concern ourselves here with a man's politics. If you will leave this matter entirely to me, I will see

(Testimony of Lester Cole.)

that this contract is adjusted and will try to get it done within the next few days.' "

Do you recall that conversation, in substance?

A. In substance; yes, sir.

Q. It represents, according to your best recollection, what did transpire?

A. That was the general substance of it; yes, sir.

Q. That is the conversation, is it not, at which you have been saying you were present with Mr. Thau?

A. Yes, sir; this, I believe, is the substance of my words to Mr. Thau. This was the only meeting where Mr. Willner, Mr. Larry Weingarten, Mr. Thau and myself were present. I think it was at that meeting I said, in substance, what Mr. Willner said I said.

Q. In other words, you have told us several times that you did have a meeting with Mr. Thau?

A. That is right; and it was at this meeting said in substance what was reported there.

Q. And you wouldn't question Mr. Willner's recollection that it did transpire about the time he indicates, which would be some time early in July, 1947?

A. Sir, I don't know.

Q. You wouldn't question his recollection in that regard?

A. I would say he was probably right. If he feels it was, it was probably around that time it occurred.

Q. Now, Willner testified further, page 311, line 10,

"Q. Was there any suggestion made at that time about Mr. Cole talking with Mr. Mayer?

"A. Yes. He said he thought it would be a good

(Testimony of Lester Cole.)

idea if Mr. Cole had a talk with Mr. Mayer, and that he, Mr. Thau, would arrange for such meeting.”

I am only giving you that, Mr. Cole, for the purpose of trying to orient you with reference to the time, and it would appear from this. And I will ask you if it is your recollection that this conversation with Mr. Thau occurred prior to your conversation with Mr. Mayer. A. Yes; it did.

Q. Then continuing, line 15, page 311, and this is Mr. [652] Willner who is now testifying. “Some time thereafter did you sit down with Mr. Thau and discuss the terms of the adjustment?

“A. Yes. I believe this was about the middle of August, in which we discussed the various changes that were to be made and which had already been agreed upon by Mr. Thau and some of the other executives. Do you want me to give the changes we discussed?”

Do you recall being present at that meeting with Mr. Thau? A. No, sir; I do not.

Q. You do not recall that? A. No, sir.

Q. Do you recall that there was such a meeting and Mr. Willner reported to you, immediately after that meeting, in the middle of August, that there had been an agreement upon all of the important terms of the contract amendment or revision?

A. I know, before I left for Mexico, with Mr. Cummings, in relation to some business in connection with Zapata, that I did find out that the terms were in substantial though not final agreement. Just when that was or how much before I don't know. And

(Testimony of Lester Cole.)

I believe I left between the third and fourth week in August. I believe it was around that time.

Q. If this conversation occurred, as Mr. Willner indicates, [563] in the middle of August——

A. I would say it was around that time.

Q. ——it would conform to your recollection that you left in the third week of August to go to Mexico and that, before you left, you were advised that the substantial terms of the amendment to your contract had been agreed upon?

A. Yes; they were in general agreement on them; that is correct.

Q. How long were you gone in Mexico, on your trip to Mexico?

A. To the best of my recollection, sir, about 10 days; less than two weeks, I believe, all in all.

Q. And, after you returned, there were some discussions and those discussions were devoted, were they not, Mr. Cole, as far as you know, to clearing up certain detail matters of agreement in connection with the amount of your work?

A. Well, they were connected with the question of vacations with pay, how they would occur, the question of my right to take further time off if I chose. I believe that those were the two main things which were of importance.

Q. Prior to that time, it had been agreed that you were to have a vacation with pay—let me see if I can't refresh your recollection. After this discussion with Mr. Thau in the middle of August, and before you went to Mexico, there was no longer any question

(Testimony of Lester Cole.)

about the fact that you were [564] to have vacation with pay, and that you were to have certain vacation without pay, but it was a question as to how those vacations were to be arranged, was it not?

A. I also believe the extent of the vacation with pay as well as to how the time was to be arranged—that both were involved in it.

Q. But by the time you left for Mexico there was no longer any question about the fact that you were to receive a favorable revision of your contract?

A. I was to receive a revision of it which was better than the other but whether or not I would have considered it favorable or not remained to be seen, or the final terms of it.

Q. However, this question of whether you were going to get a revision on account of your politics or whether it was going to be denied to you because of your politics or because of the charges that were made against you had been disposed of?

A. I think that is more accurate, sir.

Q. I didn't intend to imply anything with reference to it beyond the fact that up to that time you had been concerned that that might be the thing that was holding up an amendment to your contract. That had been cleared up by the time you took your trip down to Mexico? A. Yes, sir. [565]

Q. Now, Mr. Cole, having to do with these articles referred to by Mr. Willner and by yourself, I would like to have you identify them for me, if you will, with a little more particularity. Mr. Willner has said and you have said that there were articles ap-

(Testimony of Lester Cole.)

pearing in the Hollywood Reporter that you thought were disturbing the company.

A. Well, there was practically a daily rumor column or scarehead, during the time of the hearings, of the secret hearings, in which various people were supposedly bandying about the names of a number of people and mine was mentioned. The Hollywood Reporter——

Q. Pardon me. Your name was mentioned how?

A. In connection with the hearings, as one of the names brought out by the so-called willing witnesses, those who aided the Committee in its secret hearings. And during this period of time my name was mentioned frequently as being one of the names which was brought before this Committee.

Q. Do you recall that Mr. Willner said, and I think you did in your testimony, that reports were appearing, either in the editorials or news articles, charging you with being a Communist?

A. Yes; I believe that is so.

Q. Do you remember what the more particular nature of those articles was and whether they were editorials or news stories? [566]

A. There were editorials. They had been running for a long time. It was nothing new what was happening between the Hollywood Reporter and myself. It had started years ago and it continued over a period of time. The Hollywood Reporter at one time had a policy of getting advertising from writers, charging \$175 to \$200 a page for advertising, and I had been one of the members of the Screen Writers

(Testimony of Lester Cole.)

Guild who had opposed those, and the Screen Writers Guild passed a resolution saying they would no longer advertise, and from that time on I had been a pretty fair target for the Hollywood Reporter on any occasion they could bring up. I remember particularly one time when I was in Mexico, in 1945, for Metro, when they ran an editorial saying that a man like myself should be run out of the industry because I had dared to criticize in a magazine article changes which were made in a script I had done, called *Blood on the Sun*, and in saying that the changes, in my opinion, were harmful to the war policy of the United States at that time. The Hollywood Reporter ran an entire article saying that such people as myself, who dared to say what should or should not go into a motion picture, should be run out of this town.

Q. I am asking you what appeared during this time, when those articles were running, on things that were referred to by Mr. Willner and yourself, things that might be causing the studio to hold up an amendment or revision of your [567] contract. You have gone back into 1945.

A. I can't remember the exact articles but I am sure they are in print and on file. And I can't recall the exact nature of each article that appeared.

Q. Do you think there were a great number of them?

A. All I know is that over a period of years the Hollywood Reporter never stopped trying to put me in a disparaging light when it could.

(Testimony of Lester Cole.)

Q. And it was during this period, too?

A. That is what I said, sir. Your Honor, I wonder if I might get a drink of water.

The Court: Yes. Will you get the witness a drink of water? [568]

Q. (By Mr. Walker): Mr. Cole, I am handing you a file of the Hollywood Reporter for the period from January 1, 1947, through September of 1947. I am going to ask you to examine those down to the period when you left for Mexico, which we have fixed as being not later than the third week in August of 1947, and ask you to indicate to me articles of the type to which you have referred in your testimony.

* * * *

[569]

Q. (By Mr. Walker): Mr. Cole, during the period when the jury has been absent, you yourself, with the assistance of your counsel, have examined the file of the Hollywood Reporter for a period commencing January 1, 1947, and running through the month of August, 1947, have you not?

A. Yes, sir.

Q. And according to your observation, that is the complete file for the Hollywood Reporter for the period which I have mentioned?

A. That is right, sir.

Q. Do you find any article in the Hollywood Reporter during the period which I have identified in which your name is mentioned?

A. No, sir, I do not. But I would like to qualify that, if I may. [586]

(Testimony of Lester Cole.)

Mr. Walker: May I ask you a question, which perhaps——

The Court: Just a minute. You will be given an opportunity.

The Witness: Thank you, sir.

The Court: Let Mr. Walker finish. Go ahead.

Q. (By Mr. Walker): You do find articles in there, Mr. Cole, do you not, which in substance and effect are attacks upon alleged Communism and Communists in the motion picture industry?

A. Yes, sir.

Q. And you do find in the file during that period, Mr. Cole, articles which are attacks upon the alleged subversives, people who are subversive in their activities, in the Screen Writers Guild?

A. Yes, sir.

Mr. Walker: Now, may it please the court, have I covered, do you think, the matter we discussed?

The Court: I think so.

Mr. Walker: Yes. [587]

* * * *

Q. (By Mr. Walker): Mr. Cole, I direct your attention to testimony which you gave upon direct examination. It is the conversation which you related as one which you had with Mr. Mayer on the training coming back from New York to California. That conversation took place, did it not, after the hearing before the Un-American Activities Committee in Washington? A. It did.

Q. And you testified as follows:

Mr. Katz: What page?

(Testimony of Lester Cole.)

Q. (By Mr. Walker, Continuing): Page 454, line 20, in response to a question by the court:

“He,” referring to Mr. Mayer, “said that he was terribly upset by the method with which the Committee had treated him and myself and Mr. Trumbo, who was another employee and writer of the concern.”

Now, the concern that you are referring to there is [588] Loew's, is it not?

A. That is correct, sir.

Q. Yes. I call your particular attention to the fact that you testified that Mr. Mayer said that he was terribly upset by the method with which the Committee had treated him and you and Mr. Trumbo.

A. Yes, sir.

Q. Then, you go on with your testimony:

“He commented on the fact that he had been brushed aside rudely before he had concluded his testimony and permitted to stand right there, without being excused, and that a woman was brought on, presumably an expert on film matters, and that, while he was standing there, she testified to the effect that a picture he had made, *The Song of Russia*, had been designated Communist propaganda because, among other things, it showed children smiling.”

Do you remember that testimony?

A. Yes, I do.

Q. Now, I am going to show you your deposition, a portion of your deposition, and I am going to ask you to look at your testimony beginning with page 160, at line 5. You have a copy there.

(Testimony of Lester Cole.)

A. I have a copy here. Page 160, line 5? [589]

* * * *

Q. (By Mr. Walker): Did you give the testimony indicated at that point in your deposition, to which I have called your attention?

A. Yes, I did.

Q. Now, I am going to read, beginning on page 160, at line 5, to line 25 on that page. Question by Mr. Selvin, addressed to you, Mr. Cole:

“Q. Between the time you left Los Angeles for Washington and the time that you returned to Los Angeles from Washington, did you have any discussions or conversations with any officer, executive or representative of Loew's Incorporated with respect to the subject matter of the investigation?

“A. Yes, with Mr. Mayer and with Mr. Stricklin, his personal press representative.

“Q. Is that one conversation in which both were present or two separate conversations?

“A. Well, there were more than two. There was one conversation with Mr. Strickling, one with Mr. Strickling and Mr. Mayer, and one with Mr. Mayer.

“Q. Now, let's take them in chronological order. Which one came first? [590]

“A. First, the one with Mr. Strickling.

“Q. Where and when was that?

“A. That started in the dining car of a train on which we were returning west.

“Q. Returning west?

“A. Returning west from New York.”

(Testimony of Lester Cole.)

Then follows your conversation with Mr. Strickling, does it not? A. Yes, sir.

Q. And that reads as follows: I am picking up at that point where I stopped reading before.

“Mr. Strickling told me that Mr. Mayer was terribly upset over the results of the hearing. We discussed how badly he was treated by the Committee. He felt outraged and humiliated by the brusque cavalier manner, rude manner in which they shuffled——” and I think you said “him”?

A. I believe so.

Q. “——shuffled him around, and finally ignominiously brushed him aside.” [591]

* * * *

Q. (By Mr. Walker): And you have stated that you did so testify in your deposition, and I call your particular attention to the fact that the statement is that Mr. Mayer was terribly upset over the results of the hearing, and that you and Mr. Strickling discussed how badly he was treated by the Committee, how badly Mr. Mayer was treated by the Committee?

A. Yes, sir.

Q. Then, Mr. Cole, if you will look down to line 23 on page 161, you will find a continuation of your conversation with Mr. Strickling, that was a part of the same conversation that you have just been relating. Will you look down and see if that is not true?

A. Yes; that is so.

Q. It is a cut-back, is it not?

A. That is correct.

(Testimony of Lester Cole.)

Q. In your testimony to the earlier conversation?

A. Yes, sir.

Q. And you testified as follows, still with reference to this conversation you had with Mr. Strickling before you saw Mr. Mayer, "We discussed Mr. Mayer's role in the hearings and either Mr. Strickling or I said the following, with which either of us agreed, either one, that Mr. Mayer had been treated very badly. As I stated before, Mr. Strickling said he——" That is referring to Mr. Mayer, is it not?

A. Yes, sir.

Q. "Mr. Strickling said he was terribly upset particularly about the effect of this on Mr. Trumbo and myself and that Mr. Mayer would like to talk to me about the situation." Now I will ask you to look at line 22 on page 162 and see if that is not part of this same conversation. A. Yes; it is.

Q. I shall read it. "Mr. Strickling at the time said that Mr. Mayer was terribly concerned with the situation in regard to myself and Mr. Trumbo and said that he was seeking some formula of public relations whereby we could, Mr. Trumbo and myself, get out of this."

A. Yes, sir. But just a moment, Mr Walker——

Q. Yes.

A. In regard to the "he" there, this was Mr. Strickling. He was the press agent. This wasn't referring to Mr. Mayer—because previously you identified "he" as Mr. Mayer.

Q. Yes. In this case it was Mr. Strickling?

A. Strickling.

(Testimony of Lester Cole.)

Q. Now, the conversation which you had with Mr. Mayer you will find on page 162, beginning at line 15. "Later I saw Mr. Mayer in his drawing room. Mr. Strickling stayed for a few moments. His barber who traveled with him, valet, finished a game of gin rummy with him and left and we then had our conversation. Mr. Mayer was visibly, upset, quite [593] nervous. He was angry and he said there had to be some way found to straighten out this situation." Do you recall that testimony? A. Yes; I do.

Q. Then, if you will look on page 163, you will find a continuation of your conversation with Mr. Mayer. "The conversation with Mr. Mayer was one in which he talked a great deal about his past; in fact, it is quite biographical——"

A. That should be "autobiographical."

Q. The word here is "biographical." It should have been "autobiographical"?

A. That is correct.

Q. "I didn't say much for a long time. He was obviously wrought up and I would say anything but calm during this entire conversation. His attitude towards me personally was one of extreme friendliness and a great deal of sympathy for me and I might say for himself, for the position in which he felt he found himself. He hoped that the whole matter would blow over somehow. He didn't know how." I think we might as well read the balance of it so there can't be any question about some question being omitted which you would like to have read. "He brought up the fact that this entire business had occurred as a

(Testimony of Lester Cole.)

result of the whole conflict in regard to the Screen Writers Guild, McGuinness, and he wished that [594] the writers had never organized a Screen Writers Guild, because somehow or other he felt that this brought about the antagonism." [595]

A. Excuse me, sir. I feel, since I see in here that the next few lines or remarks were irrelevant and, if you agree with me, sir, that they are, I would prefer that they be omitted.

Q. I shall omit them. And then, continuing at line 2 on page 164, "I did very little talking in this except to assure him that I acted in regard to my best judgment but I had done nothing wrong which I didn't believe in, and that, whether or not he agreed with me, that, since I respected his honest opinions, I expected as much from him towards mine, and he said that was so, and, to the best of my recollection, that just about summed it up with this exception, that he regretted that this had occurred because he had previously stated his plans for me were such, in terms of elevating me above the position of a writer in the studio, that they were made much more difficult in the face of this added incident. I believe that generally tells the story of what happened there." Now you will note, Mr. Cole, and I will ask you to confirm it if it is a fact, that nowhere, as you related the conversation with Mr. Mayer in your deposition, did you say that Mr. Mayer said that you and Mr. Trumbo had been treated badly by the committee.

(Testimony of Lester Cole.)

A. I would like to have question repeated.

(Question read by the reporter.)

A. I will have to look back again and see that.

Q. I am referring now to the testimony in your deposition.

The Court: He just wants to check it. I will say that you didn't mention that in your deposition.

A. Thank you, your Honor.

The Court: But you satisfy yourself.

Q. (By Mr. Walker): Do you want to look at that, Mr. Cole?

A. Yes; I do, if you don't mind.

Q. Yes.

A. The question is that I did not say in my deposition but that I did in my testimony? Is that the point?

Q. The question at this time is whether or not you find anywhere in the statement in your deposition of the conversation with Mr. Mayer that he said to you that you had been treated badly by the Un-American Activities Committee?

A. No; I don't find it in my deposition, sir. Or is it?

Mr. Katz: If your Honor please,— [597]

* * * *

Q. (By Mr. Walker): Now, I direct your attention to the fact that your statement in the deposition of your conversation with Mr. Mayer ended at line 15, page 164, and that then the following questions and answers occurred, Mr. Selvin

(Testimony of Lester Cole.)

asking the questions: "Q. I take it that this, like the other conversations, is one of which you have no note or memorandum of any sort?

"A. That is correct.

"Q. Do you have any way of refreshing your recollection?

"A. Just by probing a little more deeply into my mind.

"Q. But you have at the moment attempted to do that as fully as you are capable of doing it?

"A. As of now. If you wish to take more time and let me sit back and think, maybe that will recall another snatch of dialog.

"Q. If you think of anything of consequence that might have been said, that you could recall by thinking about it for a little while, I would like you to think about it.

"A. Well, I don't think so but the time might be waster. I haven't got any inclination to do so. If it is your request, I will. [599]

"Q. My request is simply that you give me all of what took place at that time, so far as you are able to do so. If you have done that, why we will go on.

"A. I have at the present time; yes.

"Q. Now, did you have any further conversations with either Mr. Mayer or Mr. Strickling on this trip?

"A. I don't believe so; not with Mr. Mayer. I believe that I saw Mr. Strickling, and whether it was in the bar or elsewhere—but it was more of

(Testimony of Lester Cole.)

the same but nothing that I feel is pertinent to be added to it."

Do you recall so testifying?

A. Yes, sir.

Q. After reviewing the testimony on your deposition, it is a fact, is it not, Mr. Cole, that no statement was made by Mr. Mayer to you, whatever may have been said by Mr. Strickling, as to the treatment which had been accorded to him by the Committee?

A. Excuse me, sir; I want to say this. If you will recall, when I gave my deposition and came in to see both of you gentlemen at that time, I had returned from being away over three months. You were in great haste and I was brought down within 36 hours of the time I returned to Los Angeles. And I said at that time that these matters were not fresh in my mind; that I would have to think about them a great deal. And, in the course of the three or four months that have [600] elapsed since that time, I have had plenty of time to think about this matter and many of these matters have come up in my mind.

The Court: In other words, you feel that your memory is clearer now than it was three months ago, on September 10, 1948? Do you think your memory is clearer now than it was three months ago, when you gave the deposition?

The Witness: Many things have been recalled to me, because I have had all this time to think about it, and I had been trying not to think about it

(Testimony of Lester Cole.)

during this summer, and this was within two days after the time I came back. And, incidentally, on the question of Mr. Mayer's testimony regarding the gang, I recalled what that conversation really was, which I also didn't refer to in here, and I would like to so testify.

The Court: All right.

Q. (By Mr. Walker): Mr. Cole, before we proceed, your counsel thinks that your attention should be drawn in connection with the questions that I am asking you to a statement which I read to you, which he thinks may have escaped your attention. I shall read it to you so that you will have it before you in connection with the answers to the questions that I am asking you. It occurs on page 163 and this was read to you before, line 11, speaking of Mr. Mayer, "He was obviously wrought up and I would say anything but calm during [601] this entire conversation. His attitude toward me personally was one of extreme friendliness and a great deal of sympathy for me, and I might say for himself for the position in which he felt he found himself. He hoped that the whole matter would blow over somehow. He didn't know how."

I call your attention to it at the request of your counsel, and then I, again, ask you whether or not in the testimony which you gave at the time of the taking of your deposition Mr. Mayer complained of the treatment which he received at the hands of the Un-American Activities Committee.

A. Yes; he did.

(Testimony of Lester Cole.)

Q. And you so stated in your deposition?

A. No, sir. I am stating it now.

Q. I am asking you if there is any statement in your deposition to that effect.

A. Not in those precise terms; no, sir; there is not.

Q. Or in any terms, Mr. Cole? If it is there, I would like to have you point it out to me.

A. Well, sir, I can only state that the conversation on page 161, between Mr. Strickling and myself——

The Court: He is not talking about that.

A. That is tied in, your Honor, and I wanted to explain something, if I may, that the conversation between Mr. Strickling and myself, which I gave in my deposition, regarding the fact that either one of us had said that Mr. Mayer had been treated [602] very badly—that, as we got on later and I spoke of the fact that he was upset and he was anything but calm, referred to the fact in my mind at the time that I gave the deposition—I mentioned that I was explaining that situation. Now, it is true that it isn't so stated specifically in here but that was my intention, what I had hoped to convey.

Q. (By Mr. Walker): You did have it in mind, then, at the time your deposition was taken, that Mr. Mayer had said that he had been treated badly by the committee?

A. Well, sir, I had said that Mr. Strickling had said so or I had said so, and that either one

(Testimony of Lester Cole.)

of us had agreed with the other on this, and this was the basis for Mr. Strickling's discussion of Mr. Mayer's feelings, and I didn't feel it was necessary to repeat it again when it came to the reporting of the situation to Mr. Mayer. He spoke for over two hours at that point.

Q. Do you have it in mind at the time your deposition was being taken that Mr. Mayer had complained of the treatment accorded to you and Mr. Trumbo by the committee?

A. I am not sure whether that was in my mind at that time or whether this is what I remember, since the deposition was taken.

The Court: Are you certain that he expressed regrets or commiserated with you over the treatment that Trumbo and yourself had received? [603]

A. Your Honor, that is what I attempted to testify, to that effect. Yes; that is my testimony.

Q. (By Mr. Walker): You didn't mean in your deposition? A. No; that is right.

Q. You mean in court?

A. I was answering the Judge's question.

Q. Now, Mr. Cole, it was a matter of real consequence to you that Mr. Mayer should approve or at least that he should not disapprove your conduct before the Un-American Activities Committee, was it not?

A. I had no reason to know that Mr. Mayer did not approve of my conduct before the Un-American Activities Committee.

The Court: That doesn't answer the question.

(Testimony of Lester Cole.)

That is not the question he is asking you. He wants to know whether you were interested in whether he should or should not approve.

A. I know this, that Mr. Mayer and I on some matters, philosophical matters, were in disagreement on a number of things, and I would say it related to many matters in life were so fine. I don't think we held similar ideas on any number of matters, but I don't believe there was any discussion of that point regarding my particular conduct before the hearings nor certainly did he give me any indication as to how he felt he would like me to conduct myself at those hearings. [604]

The Court: But, after that, was it a matter that he should or should not approve your conduct?

A. I didn't have any particular reason to believe that Mr. Mayer would fully understand—or he didn't give me any indication that he was fully aware of all of the so-called philosophical or constitutional points that were involved in the position I took before the committee.

Q. (By Mr. Walker): I would still like to have an answer to my question, Mr. Cole, and that question is was it not a matter of consequence to you, at the time that you talked to Mr. Mayer on the train, to know whether or not he did or did not disapprove of your conduct before the committee.

A. I would have liked to have had him express such approval. On the other hand, he did not express disapproval. As a matter of fact, what he

(Testimony of Lester Cole.)

said was, when I brought up to him that this treatment by the committee of himself and of Trumbo and myself and the others was, in my estimation, indecent and immoral—that is when the word “gang” came in. And he said, “What can you expect from a gang of cutthroats like that committee?”

Q. Do you consider you have answered the question I have asked you?

A. I tried to.

Q. Will you try again——

The Court: No, no. [605]

Mr. Walker: I move that his answer be stricken out as not responsive to the question.

The Court: I will deny that. I will grant it as to the last statement because he brought that in pursuant to his statement that he wanted to explain the word “gang.” I will strike the last paragraph. I will have the answer read because the first sentence is a specific answer to your question and it is a positive answer and then he explains. Sometimes, you see, when you stand up and ask questions, and I think you said so the other day when we were talking, the man who sits down can get the full import of the answer better than the man who is asking the question standing up, and that is correct. [606]

I think, if we have it read, you will find that the first sentence is a complete answer and I can't strike anything after that because he is entitled to an explanation, but the last paragraph, in re-

(Testimony of Lester Cole.)

gard to the gang, will be stricken because it is not germane to the topic. If Mr. Cole, on re-direct examination, wants to explain that matter, and bring into question that statement about the gang, he may do so. Will you read the question and the answer, Mr. Reynolds?

(The reporter read as follows: "Q. (By Mr. Walker): I would still like to have an answer to my question, Mr. Cole, and that question is was it not a matter of consequence to you, at the time that you talked to Mr. Mayer on the train, to know whether he did or did not disapprove of your conduct before the Committee?

"A. I would have liked to have had him express such approval. On the other hand, he did not express disapproval. As a matter of fact——")

The Court: All that goes out beginning with the words "As a matter of fact." That is stricken out and the jury is instructed to disregard it. So the answer stands that he would like to have had the approval.

Mr. Walker: He has still not told me whether it was a matter of consequence.

The Court: I think that is a sufficient answer. Proceed to another topic. [607]

Q. (By Mr. Walker): Now, Mr. Cole, you have indicated to the court and to the jury that, when you came to have your deposition taken, there was a great rush about it. You knew—did you not—at the time that you came to have your deposition taken that the depositions of a number of

(Testimony of Lester Cole.)

people, whose positions were not dissimilar to yours in many particulars, had already been taken by Mr. Selvin or by me?

A. I knew that the day before my deposition was taken by you, sir.

Q. And you had been back in the mountains, as you say, for several months?

A. That is correct.

Q. But you did arrive in Los Angeles sufficiently before the time of the taking of your deposition to have a conference with your attorneys, did you not? A. Yes, sir.

Q. And you knew that these same attorneys had been participating in the taking of these other depositions to which I have referred?

A. That is correct, sir.

Q. And you did confer with them, and I am not asking you for specific comments one way or the other, but you did confer with them in regard to the fact that your deposition was to be taken?

A. Yes, sir. [608]

Q. And there was a discussion, was there not, of the matters which would probably be covered in your deposition?

A. Generally; yes, sir.

Q. You arrived in Los Angeles when? I am not asking for the date but when this reference to the taking of your deposition did you arrive?

A. I believe two days before. Actually, I think it was late in the afternoon of Wednesday, the

(Testimony of Lester Cole.)

8th and my deposition was taken on the 10th of September.

Q. On the Friday morning following?

A. It started on the Friday morning following; that is correct.

Q. And you advised your lawyers as soon as you arrived in Los Angeles, did you not?

A. Yes; I called their office and told them I was here; that is correct.

Q. And arranged conferences with them?

A. That is right, sir.

Q. Bearing in mind the opportunity that Mr. Selvin gave you to extend your statement with regard to the conversations which you had with Mr. Mayer on the train, and bearing in mind the testimony that you gave in your deposition in regard to that conversation, do I still understand you to say that Mr. Mayer told you on the train that he was upset about the matter and method by which the Committee treated [609] you and Mr. Trumbo?

A. The manner and method?

Q. Well, the method by which.

A. I don't know whether I used the word "method," sir, but, in substance, I would say he was upset by the treatment accorded to himself, to Mr. Trumbo and me, by the Committee.

Q. And that he said so? A. Yes, sir.

Q. And you say that notwithstanding the matters to which I have called your attention?

A. That is correct, sir. [610]

Q. (By Mr. Walker): I think, Mr. Cole, in

(Testimony of Lester Cole.)

your relation of your conversation with Mr. Mayer in the summer before you went back to Washington, to give your testimony, that you told Mr. Mayer, among other things, in effect, that you had always been interested in underprivileged people?

A. Generally, yes, that is correct, sir.

Q. Now, it is a fact, is it not, that you have been interested in underprivileged, in the underprivileged?

A. Well, it sounds like one is being a philosopher, which you put it in that way, and I am not anything of the sort. I have always been interested in the problems that come from underprivilege.

Q. You have been interested in social and humanitarian movements, have you not?

A. I have been interested in social and humanitarian problems, sir.

Q. Yes, sir. And you have been interested in legislation and political, democratic developments that were related to these humanitarian and social problems?

A. Yes, sir.

Q. Is that not true? A. Yes, indeed.

Q. I think you said you were born in 1904?

A. That is right.

Q. You were a little young to be particularly interested [611] in the first World War and with causes that led up to it?

A. Well, to be particularly interested at the time.

Q. At the time?

(Testimony of Lester Cole.)

A. Although, it so happened——

Mr. Katz: Just a moment. We are going to object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: Well——

Mr. Walker: I don't know how Mr. Katz knows it at this stage of the examination.

The Court: Yes.

Mr. Katz: Well——

The Court: Well, I will allow the question to remain but I don't think that the statement he has made to Mr. Mayer, which he has copied here, warrants in this lawsuit going into an inquiry as to any of the matters he may have been interested in. That is outside of the purport of this lawsuit. We are not determining his ideology of the past, present and future. We are here merely to determine his lawsuit.

Mr. Walker: I am not investigating his ideologies, if he has any. I am not indicating, even, that he has any.

The Court: Well, you are starting to talk about ideology of the First War. I have no particular objection to asking him about it, but—— [612]

Mr. Walker: May I respectfully submit——

The Court: Counsel has given you notice, now, that he is going to object to any further inquiry along those lines.

Mr. Walker: I have no objection to objections by counsel. I assume that is one of his duties and provinces.

(Testimony of Lester Cole.)

The Court: Well, let us get to the next question. I will see what your next question is.

Mr. Walker: Yes, but I want to say, before I go to the next question, this is cross-examination. There are certain things that have to be developed.

The Court: I understand that.

Mr. Walker: And developed slowly.

The Court: But cross examination is limited to material matters. Merely because a man says he told a man that he was interested in the underprivileged, or whichever way he puts it, does not mean that you can start in and ask him about every movement that he has ever been connected with. It is cross examination. It is immaterial matter and even without objection I would ask you to desist.

Mr. Walker: Well, I will make the explanation to the court, if the court requires that I do so.

The Court: I am not asking for any. I don't want any explanation. I am just telling you to ask another question and I will rule on it.

Mr. Walker: I am going to ask some questions.

The Court: Go ahead.

Mr. Walker: On this line.

The Court: Go ahead and ask them.

Mr. Walker: I understood you to say that you had been interested not concurrently but subsequent in the First World War and to the causes that led up to it, is that correct?

Mr. Kenny: Now, as to that we will object on the grounds stated.

(Testimony of Lester Cole.)

The Court: I will sustain the objection.

Q. (By Mr. Walker): I will ask you, Mr. Cole, you were interested, were you not, in the Second World War and the causes and events that led up to it?

Mr. Kenny: I make the same objection.

The Court: I will sustain the objection.

Mr. Kenny: And objection to this whole line of inquiry.

The Court: That is all right. Make your objection as the question arises. I don't want to cover them by an omnibus objection.

Q. (By Mr. Walker): Did you follow, as best you could, and were you interested in the Nazi movement in Germany?

The Court: I will sustain the objection.

Q. (By Mr. Walker): Did you follow——

The Court: I did not mean to—I saw you rising and I assume that you would?

Mr. Kenny: Thank you. [614]

The Court: All right.

Q. (By Mr. Walker): Did you follow, Mr. Cole, at least to the extent that the ordinary citizen does, the developments in Soviet Russia?

Mr. Kenny: The same objection.

The Court: The objection is sustained.

Q. (By Mr. Walker): I assume that you had at least the average interest of the citizen of this country in the ideologies of Hitler Germany and Soviet Russia, is that true?

Mr. Kenny: Your Honor, I object to that.

The Court: Yes. Objection sustained.

(Testimony of Lester Cole.)

Mr. Kenny: And I ask the court to——

The Court: That is right.

Mr. Kenny: There must be a limit.

The Court: That is right.

Mr. Kenny: To the line of inquiry.

The Court: Wait. Let us not argue. Let the questions be asked and I will rule on them. I don't desire any argument by you. If I want any, I will ask for it. Go ahead, ask the next question.

Q. (By Mr. Walker): Isn't it a fact, Mr. Cole, that throughout the period of a number of years prior to the fall of 1947, you were interested in economic and social problems generally?

Mr. Kenny: Now, the same objection, your Honor. [615]

The Court: I will sustain the objection.

Q. (By Mr. Walker): I assume, Mr. Cole, that you obtained your information, whatever it may have been, in regard to the type of problem concerning which I have been asking you, by discussion with other people and by reading, isn't that the case?

Mr. Kenny: Your Honor, we object on the same ground.

The Court: Yes.

Mr. Kenny: And upon the additional ground that it assumes facts not in evidence.

The Court: Yes. The objection will be sustained. [616]

Mr. Walker: Well now, may it please the court, I think I have probably not completed the record

(Testimony of Lester Cole.)

that I want to make, but I think that we have reached a point where we probably should confer with your Honor in the absence of the jury.

The Court: Unless counsel insist or the plaintiff insists, I think we should do it in the presence of the jury. I think we have gone so far now, you may ask additional questions and I think we should do it—unless counsel insists on it, I think it should be within the hearing of the jury.

Mr. Kenny: We are content with your Honor's suggestion.

The Court: What?

Mr. Kenny: We are content to proceed in this way.

Mr. Walker: Will you get the last question? I think your Honor sustained the objection to it.

The Court: Yes, I sustained it. I want the record to show that it is at your request that I will hear you outside of the presence of the jury. If you insist, I shall hear it. If not, you may ask any question in the presence of the jury and I will give the proper instructions at the proper time to the jury.

Mr. Walker: Your Honor, this leads to a question which your Honor particularly requested be discussed with you outside of the hearing of the jury.

The Court: Well, I have changed my mind since that time. [617] You remember it was tentative and we were talking in chambers and I thought at the time you gave notice that you would ask certain

(Testimony of Lester Cole.)

questions, and I said that I thought it would be best to ask them outside of the presence of the jury. In view of the intimations that have been given, now, and the questions you have asked, I feel that no harm will result from allowing you to ask them in the presence of the jury and having whatever ruling I make right in the presence of the jury.

Mr. Walker: I think your Honor has entirely mistaken the purpose of the questions which have been asked down to this point.

The Court: Well, all right, regardless of that—regardless of that, if you insist that the next question should be asked outside of the presence of the jury, you may step to the bench and do so, but I do not want it—but I have no particular interest in your asking it outside of the presence of the jury, and counsel for the plaintiff has indicated that you do not have to, but if it pleases you, you may step up here and read the question outside of the hearing of the jury and then I will reserve to myself the right, if I so choose, of informing the jury what the question was, if I so choose, and I will do it on my own responsibility.

Mr. Walker: This question to which I refer has not [618] been——

The Court: That is all right. It may be the one next to the one.

Mr. Walker: It is leading up to the question.

The Court: If it is leading up, I will leave it to you. I am not putting you on the spot, in the language of the screen. I realize that you said there

(Testimony of Lester Cole.)

were certain types of questions you wanted to ask and I said I thought they should be asked outside of the presence of the jury.

Mr. Walker: Now, you are relieving me of any obligation to confer with the court outside of the presence of the jury with reference to the questions?

The Court: That is right. You are absolutely relieved of it and I take the responsibility, now, unless counsel insist that they be asked—in other words, I am leaving it to each of you.

(Whereupon Mr. Walker approaches the court bench.)

The Court: Let us get the reporter up here.

(Thereupon the following proceedings were had within the presence and hearing of the court, without the hearing of the jury:)

The Court: All right, go ahead.

Mr. Walker: This series of questions leads up to the question of asking this man whether or not he is now or ever has been a member of the Communist Party. [619]

I want to be very sure that you have relieved from my obligation not to ask that question in the presence of the jury until such time as we confer with you in chambers. In other words, I want no mistake about my understanding of being relieved of any obligation in that regard.

Mr. Katz: Would you wait just a second. Mr.

(Testimony of Lester Cole.)

Margolis. Excuse me for doing this, but this is my policy——

The Court: Well, perhaps I ought to state, for the record, that I am so satisfied that the question would be improper and could not under any circumstances be accepted, that while we were in chambers I suggested that in view of the nature of the question, it might make a bad impression on the jury, just to have it asked. Now, so far as I am concerned, I think the question is irrelevant, but I would not criticize counsel for asking it. However, when it is asked, I would either then or later on instruct the jury, as the occasion arises. And if I should hold to my conviction that it is entirely irrelevant, I would instruct the jury that no inference should be drawn from the asking of it as to what the answer would be and no inference contrary to Mr. Cole should be drawn from the fact that his counsel objected to it and that the question is entirely irrelevant and unrelated to this controversy because I will state now, it is not a ground, it is not a ground of—it is not inserted as a ground of suspension and we are dealing with a written [620] contract and the law is that in a written contract requiring notice of termination, the notice of termination must give a ground specified in the notice, and if that is not a true ground, the mere fact that he has other grounds doesn't exist; in other words, where no contract exists, if no contract exists, then if an employer discharges an employee, it matters not whether he knew of the

(Testimony of Lester Cole.)

ground. He can defend it upon the ground that came into being or the truth of which he learned later on. That is the point I was making in chambers.

But where a contract exists requiring notice of suspension, as here, and a notice is actually given, the defendant cannot offer evidence of other grounds that might warrant discharge.

And in fact I have got an instruction according to it. I will read it to the record—I have studied this problem. I think you have submitted an instruction, but I have worked one out, combining this also with the statement of the court in May case where they say that the ground so far as the employer is concerned must be true, and here is the statement.

Mr. Katz: Is that *Corpus Juris Secundum*?

The Court: *Corpus Juris Secundum*, Master and Servant, page 435:

“In the absence of statutory or contractual requirement, it is not necessary for the master [621] to assign a reason for the discharge, nor, according to the rule usually recognized, is he estopped to rely on a reason other than, or different from, that assigned at the time of discharge, whether or not known to him at the time of discharge.”

Remember that is in the absence of statutory or contractual requirement. Then it goes on:

“According to some decisions, however, if an employer, in discharging an employee, assigns a particular cause of complaint, he will be held to it. It

(Testimony of Lester Cole.)

has been held that an employer who has disposed of his business and thereupon has discharged an employee cannot fall back on a reserved right to discharge for unsatisfactory service, as a justification of the discharge. Where, under the contract, the employee is entitled to a written notice of termination specifying the cause, a discharge in connection with which a cause is not specified or an insufficient cause is specified is wrongful, and, it has been held that the employer may not justify the discharge by reliance on a cause not specified in the notice." [622]

I may say, I have examined these cases and among them a very late New Mexico case, and it fully supports this principle which is also declared in the May Company case. So that if you give that as a ground, not that he is a Communist, not that he sympathizes with Communism, but that he conducted himself in a certain manner before the committee, you are limited to defending it upon that ground, namely, that his conduct was such that it violated that particular section. You can argue to the jury that his conduct was such that people inferred he was a Communist. That is not a matter which can be excluded, but you cannot in this proceeding ask him whether he is a Communist or try to prove that he was.

Mr. Walker: Well, I am not trying to prove that he was. I am not trying to prove that he was and may I say this: That the basis for the asking of that question and the pertinence of that question is not on any theory that we discharged him or had a right

(Testimony of Lester Cole.)

to discharge him or suspended him or had any right to suspend him on the basis of fact that he was a Communist. That is not——

The Court: Well, what is the purpose of the inquiry?

Mr. Walker: Well, that is the thing which I say has to be developed at considerable length.

The Court: I don't think I—you can state to me, right now, for the record, why you think it is material.

Mr. Walker: Well, in the first place, we think it goes [623] to the reason for his conduct before the committee. Now, he has indicated and will indicate, I take it, his reasons for conducting himself as he did before the committee, his refusal to answer these questions. We think that it is a perfectly proper inquiry to find out if, as a matter of fact, his reason for not replying to the question wasn't something different from the reason that he assigns. If as a matter of fact the man is a Communist, he may have had very good reason for not wishing to answer that question.

The Court: But we are not going into the reasons. You are insisting that his conduct, not only his refusal to answer but his entire conduct is such that, therefore, it doesn't make any difference. I am not going to give any instruction requested by the plaintiff to the effect that if you believe he had a right, he was justified.

It is my theory of the law that except that the conduct must be willful in the sense that the man does

(Testimony of Lester Cole.)

it with full knowledge of the consequences, as to which I will give the very language of the May case, a good reason or a bad reason of his conduct is not material one way or the other. In other words, he did it and if he did it willfully, knowing what he was doing, it doesn't make any difference whether his motive was good or his motive was bad, it would work both ways, and I am going to reject all the instructions offered to the effect that if he thought that it wasn't [624] a violation, that he was justified in doing that.

Mr. Walker: Yes, but we have to make a record.

The Court: It works both ways.

Mr. Walker: We have to make a record in this case.

The Court: Well, you are making the record right here.

Mr. Walker: I understand.

The Court: That is why I am giving you the reason. I will state right now——

Mr. Walker: I wish you to understand that I am not just doing it recklessly. I am doing it because I have a good reason or I think I have a good reason.

The Court: I am not questioning your motive.

Mr. Walker: No.

The Court: I am merely saying that the matter is absolutely foreign and is of a character that would bring us into a lot of matters that are of no concern to this jury, or for that matter, no concern of mine in the portion of the case that I have to determine. [625]

(Testimony of Lester Cole.)

So I will make this ruling. I will not allow any question to be asked as to whether the plaintiff was at the time of the incident a Communist or whether he was a member of the party, whether he was a Communist either in theory or an actual member of the party in the past or whether he is a Communist or a member of the Communist Party at the present time. In other words, I am making it broad enough to include as Communists persons who may believe in it and yet not be affiliated with the party.

Mr. Walker: People who are sympathetic, in other words?

The Court: Yes. And if you want any further record, go ahead and ask him, and I will just not tell the jury anything. I will just tell them that I will exclude certain matters. This record is perfect as it is.

Mr. Walker: Very good.

The Court: All right.

Mr. Walker: All right.

Mr. Kenny: That leaves it that the questions are not to be asked.

Mr. Walker: What?

The Court: Not to be asked. They are not to be asked.

Mr. Kenny: The record that has been made here.

The Court: They are not to be asked now; they are not to be asked, at the present time. You have already asked them. [626]

Mr. Walker: Well, I haven't asked that question.

The Court: Well, I mean I am telling you in ad-

(Testimony of Lester Cole.)

vance that in view of what has taken place, I am ruling on it now and the question should not be asked in the presence of the jury.

Mr. Walker: I understand. The question will not be asked in the presence of the jury.

The Court: Yes.

Mr. Walker: That the question will not be asked in the presence of the jury.

The Court: All right.

Mr. Walker: I just wanted to be sure I understood.

The Court: Now, that is correct.

Mr. Walker: Now, that does not cut me off from my asking other questions which I have here and which I think pertinent questions?

The Court: If they are of the character as to which I have sustained objection, I think you should desist because your record is clear, and there is no use asking some questions relating to political beliefs and ideas when I have indicated that I do not think they relate to the matter.

Mr. Walker: Why don't I get my notes here and indicate to you the type of questions I wish to ask?

The Court: All right. Bring them up, while you are here. [627]

Mr. Walker: Yes.

The Court: All right. You read into the record whatever you have, either in the form of narrative or questions and let counsel make the objections and I will rule on them, now, without any further discussion.

(Testimony of Lester Cole.)

Mr. Walker: That is right.

The Court: I have already indicated my rulings.

Mr. Walker: The last question——

Mr. Selvin: How long is this going to take and are we going to continue after this is finished?

The Court: Let us not talk about that.

Mr. Selvin: Can the jury be excused for today?

The Court: That is all right.

Mr. Walker: Well, only, Judge, this is a lengthy thing.

The Court: That is all right. It doesn't matter. Finish it now.

Mr. Walker: The last question which was asked and to which I understand objection was made, was in substance:

Q. Of Mr. Cole: As to whether or not, in order to indulge his interest in the things concerning which he has testified, that he had an interest, he gathered his information concerning them for the most part from reading and from discussions with other persons.

Mr. Katz: The objection to that question has already been sustained. [628]

The Court: Yes, that is right.

Mr. Walker: We will assume objection has already been made to all of these questions and we are assuming that the judge is sustaining your objections, unless the judge indicates otherwise.

The Court: For the record, I have already indicated my ruling.

Q. (By Mr. Walker): Now, in reading, I as-

(Testimony of Lester Cole.)

sume that has been a reading of newspapers, magazines, pamphlets, periodicals of various sorts and perhaps books to a greater or less extent in regard to less current matters?

Mr. Katz: Now, we object to that question upon the ground it is immaterial.

The Court: The objection is sustained.

Mr. Walker: As I said, I think Mr. Katz, it is understood that an objection has been made to each of these questions.

Mr. Katz: All right.

Mr. Walker: And that the objection has been sustained unless the judge indicates otherwise.

Mr. Katz: All right.

The Court: Step down, step down.

(The court addresses Mr. Cole, the plaintiff.)

Q. (By Mr. Walker): Reading and discussing these matters, I take it that you have been in the habit of reaching your [629] own conclusions or judgments in regard to them and that your judgments sometimes agree and sometimes disagree with what appeared to you to be the more generally accepted attitude on matters of current interest?

You knew, of course, from your reading that in the summer and fall of 1947, the relations between this country and Soviet Russia were not as friendly as they might be, did you not?

And you knew, did you not, that there was a quite general feeling, there was a quite general feeling in the United States that the ambitions and policies were or were what were thought to be the ambitions

(Testimony of Lester Cole.)

and policies of Soviet Russia were a danger to the peace and happiness of the United States?

The Court: I think that some of those questions are so broad, you may want to make additional objections.

Mr. Katz: Yes.

The Court: And I do not want them to be covered by a blanket objection.

Mr. Katz: Our further grounds would be that they are vague and that they call for a conclusion of the witness as well as being immaterial and incompetent.

The Court: I will add to my statement that I do not believe that a discussion of foreign affairs or the relations between this country and Russia has any place whatsoever, by even the remotest stretch of imagination, in this lawsuit, [630] for this lawsuit is not a forum for discussing the foreign policy of the United States with which I as a judge am in agreement, and by sustaining the objection to the question I am motivated solely by the fact that the matter is alien to the controversy. [631]

There is no room in this lawsuit for discussion of abstract philosophies and I do not desire the attention of the jury to be diverted from the one issue with which it is concerned.

This morning I was asked by the Senior Judge, by the Chief Judge, in his absence, to commemorate the adoption of the Bill of Rights. I could have done it in the presence of the jury, but I was so fearful that even a patriotic language and a com-

(Testimony of Lester Cole.)

parison between the philosophy of constitutional government and totalitarianism, including both Fascism and Communism, might give the erroneous impression, that I chose to do it in the morning outside of the presence of the jury and advance the matter from Tuesday morning, when it was officially set by Judge McCormick, to the present time.

All right, now, proceed with your next question.

Q. (By Mr. Walker): From reading and discussions and your own observation, you had reason to believe, did you not—

Mr. Kenny: Would you keep the volume down a little bit?

The Court: All right.

Mr. Walker: —during the period in question that at least a considerable portion of the people of this country had come to believe, rightly or wrongly, that Soviet Russia was seeking to interfere with the internal affairs of this country, with the ultimate objective of destroying our form [532] of government and its fundamental and traditional institutions?

Mr. Katz: For the grounds stated by the court and the grounds which I would like to repeat, that it is completely alien to this question, completely immaterial and a conclusion of the witness and not in any way germane to any of the issues in this case, we object.

The Court: All right. The objection is sustained.

Mr. Walker: I understand that it is the substance of the question to which the objection is being raised and not particularly the form.

(Testimony of Lester Cole.)

Mr. Katz: Well, in the interests of time, we will say that it is the substance. The question could not be rephrased, in my opinion, to obviate the vice of its insubstantiality.

Q. (By Mr. Walker): During the period in question, from your reading, discussions and observations, you had reason to believe, and did believe, did you not, that at least a considerable portion of the people of this country thought, rightly or wrongly, that one of the instruments by which Soviet Russia sought to accomplish this objective, was the Communist Party in this country?

Mr. Katz: We object to that question on the same grounds, as stated.

The Court: All right. I will sustain the objection.

Mr. Walker: During the period referred to, you knew, did you not, that in the Selective Training and Service Acts [633] of 1940 and 1942, it was declared, "It is the express policy of Congress that whenever a vacancy is caused in any business or industry by reason of induction into the services of the United States of an employee, pursuant to the provisions of this Act, such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund"?

Mr. Katz: We object to that upon the ground it is incompetent and immaterial.

The Court: All right, the objection will be sustained.

Q. (By Mr. Walker): During this same period, you knew, did you not, that by an executive order the President of the United States had established

(Testimony of Lester Cole.)

“an employees loyalty program in the executive branch of the Government”, which declared in effect that in testing loyalty there should be considered membership in the Communist Party or organization?

Mr. Katz: Object to that upon the ground it is immaterial. It does not affect private employees.

The Court: The objection will be sustained.

Q. (By Mr. Walker): During the period in question you knew, did you not, that the Taft-Hartley Act provided in effect that the use of the offices of the National Labor Relations Board would be closed to any labor organization whose officers, the officers of which failed to file affidavits stating that they were not members of the Communist Party? [634]

Mr. Katz: I object to that on the ground it is immaterial and not germane to any issue in this case.

The Court: The objection is sustained.

Q. (By Mr. Walker): During the period in question, you knew, did you not, that the Emergency Relief Appropriation Act of 1942 had provided in effect that no employment on any project under that Act should be given to any Communist?

Mr. Katz: I object to that upon the ground it is immaterial.

The Court: Objection sustained.

Q. (By Mr. Walker): During this period, you knew, did you not, that there were court decisions holding in effect that the policy of the Communist Party in this country is formulated, in whole or in part by influences outside of this country and that

(Testimony of Lester Cole.)

it advocates the overthrow of this government by force and violence?

Mr. Katz: We object to that upon the ground it is immaterial.

The Court: Objection sustained.

Q. (By Mr. Walker): During this period, you knew, did you not, that there were decisions of courts of this country to the effect that to call a man a Communist was to bring upon him the scorn, contempt and hatred of a substantial part of the community?

Mr. Katz: We object to that upon the ground it is [635] immaterial.

The Court: Objection sustained.

Q. (By Mr. Walker): During this period of time, you knew, did you not, or, if you did not know, had reason to believe, from your reading, observations and discussions that a substantial part of the people of this country believed, rightly or wrongly, that a member of the Communist Party was an agent of and unfriendly foreign power?

Mr. Katz: We object to that upon the ground it is immaterial.

The Court: Objection sustained.

Mr. Walker: Well, may I complete it and then just have one objection?

The Court: I beg your pardon?

Mr. Katz: I beg your pardon?

Mr. Walker: (Continuing) —and was disloyal and was one who advocated the overthrow of the government of the United States by force or violence or other unconstitutional means?

(Testimony of Lester Cole.)

Mr. Katz: We object upon the ground it is immaterial.

The Court: The objection is sustained. [636]

Q. (By Mr. Walker): During this period you had reason to believe, did you not, from your reading, observation and discussions that a substantial part of the community had a strong dislike and fear, whether rightly founded or not, of anyone whom they regarded as a Communist or a Communist sympathizer?

Mr. Katz: We object to that upon the ground it is immaterial.

The Court: Objection sustained.

Q. (By Mr. Walker): During this period you believed or had reason to believe, did you not, from your reading, observation and discussions, that at least a considerable part of the people of this country would hold in scorn, contempt and hatred anyone whom they believed to be a Communist?

Mr. Katz: We object to that upon the ground it is immaterial.

The Court: Objection sustained.

Mr. Walker: That is the line of questions I think that—

The Court: How about the direct question you were going to ask?

Mr. Walker: Well, that is a long way off.

The Court: Go ahead.

Mr. Walker: What?

The Court: Time doesn't mean anything. Go ahead.

Mr. Walker: Well, I think some of these ques-

(Testimony of Lester Cole.)

tions I [637] will be very glad to—I think that certainly you are going to permit him to testify in regard to—

The Court: Let us get all these “subversive” questions in, now, so we won’t have to stop again.

Mr. Walker: That is the end of the questioning—

The Court: How about the question as to whether he is a Communist? I don’t want to interrupt the hearing further.

Mr. Walker: Well, the question can go in at this time as well any other place, I think.

The Court: That is all right.

Mr. Selvin: Of course, the foundation for the question would not have been laid even if answers had been permitted to the questions which are now placed on the record, that is the foundation which we intended to lay.

The Court: Read them off, read them all.

Mr. Selvin: They may go into another subject.

Mr. Walker: Another, but related subject.

The Court: Well, I think regardless of the—I don’t mind interrupting, gentlemen. You are trying this case, not I, so far as the jury is concerned, and if you desire further interruptions, if you desire interruptions quite often and they cannot be avoided, I will be glad to conform, but—

Mr. Walker: I think the question will become more appropriate at a later point, your Honor, and I will ask it then. The interruption will be very brief then. Again it [638] will be a matter of stopping and stepping up here for one second and asking the question.

(Testimony of Lester Cole.)

The Court: Well, I have already stated at the beginning of this discussion that I do not consider any inquiry as to his being a Communist or a member of the Communist party as being material.

Mr. Walker: That is right, I understand.

The Court: Then, I cannot see any reason why it is necessary to repeat it for your record.

Mr. Walker: Well, I think your Honor should state that you do not regard it as material and if the question is asked—

The Court: And objected to, and objected to.

Mr. Walker: Well, find out whether it will be objected to.

Mr. Katz: It will be objected to and we say in the light of what has now transpired that this question should not be asked in the presence of the jury, that counsel knowing what the rulings are and what germane questions are—

Mr. Walker: I say the question will be asked, now.

Mr. Katz: All right, the question is objected to in the presence of the jury.

Mr. Walker: All right.

The Court: Mr. Reporter, will you find that part at the very beginning and read it?

Never mind now. If you feel, later on, after it has been [639] written up, that the form of that question is not right, I will allow you to do that. I want to add one thing, because this will go into the record and may become public property, that I am thoroughly convinced that all this inquiry about the attitude of the plaintiff towards Communism in general, to-

(Testimony of Lester Cole.)

wards Soviet Russia and towards our own general policy, is foreign to the inquiry before us.

Furthermore, that if the questions were asked and answers given in the negative to all of them and if the plaintiff actually denied membership in the Communist party, the very asking of these very questions would create in the minds of the jurors an impression which it would be impossible to eradicate without going into proof, negative proof, other than the testimony of the plaintiff. To illustrate, I feel that some of these questions are of such a nature that would warrant the plaintiff in this case in offering proof that people held contrary belief, or even producing evidence of the fact that certain attitudes and beliefs are or are not entertained by people belonging to a certain particular group.

In the private conversation with counsel, I called attention to a recent article in the Harvard Law Review, in the last issue, which showed the broad scope which evidence of this character can take. Now, in California, you are familiar with the criminal syndicalism act and know the broad scope of inquiry which you can take in that connection, and I feel that [640] such an inquiry would entirely detract the attention of the jury from the one fact they have to decide, namely, whether the conduct was such as to shock the community and even if this were a case in which the jury could render a verdict for the plaintiff or for the defendant, which it is not, the inquiry would be absolutely foreign and would not serve to prove or disprove the rightness or the wrongness of the suspension which is the ultimate fact that

(Testimony of Lester Cole.)

the court must decide, nor would it serve the jury in arriving at the conclusion whether the conduct of the plaintiff was in violation of the provision of the contract.

I am further of the view, and I make this as a statement so that it will be in the record, that this inquiry is alien to the entire topic and I would not allow these questions to be asked even on the portion of the case which I am to try, in determining the judgment to be entered in the case after the jury has rendered its special verdict which is to be submitted to them.

Because of the nature of this case and because we are living in critical times, I desire to state that in doing so, I am not seeking to protect the plaintiff in this case against any imputations or against any imputation which might be made against him; I am protecting the integrity of this court in seeing that inquiries which are foreign and which are likely to arouse the passions of the jury are not brought before the [641] court and I am firmly convinced that a discussion of these problems which would follow, if the questions were allowed to be answered, whether affirmatively or negatively, would so arouse the passion of the jury, who I know are opposed to Communism and to Fascism and to all totalitarianism, just as I am and just as the counsel for the parties here are, that it would make it impossible to secure from them a fair and impartial answer to the interrogatories which are to be submitted to them.

I am stating this not so much in defense of myself,

(Testimony of Lester Cole.)

because my attitude is known and only this morning, in open court, I expressed my abhorrence of Fascism and Communism and declared it, in this very court room, to be contrary to not only the spirit of the Bill of Rights and the theory of our own government, but alien also to our lives and actions and our history.

Mr. Walker: Now, may I make this very brief statement?

The Court: That is all right.

Mr. Walker: That I have heretofore stated in the record my reasons for believing that it was proper and pertinent to ask Mr. Cole the question as to whether he is a Communist, with reference to the question—

Mr. Margolis: May I interrupt?

Mr. Walker: No.

Mr. Margolis: I suggest that the jury be excused.

The Court: It does not make any difference. Leave that to me. They are comfortable.

Mr. Walker (Continuing): —with reference to the questions to which the court has just sustained objections, I would like to state that the purpose of the inquiries involved in the questions, as will appear by the questions themselves so far as they have been asked, will indicate that they were not designed to, and would not develop the political beliefs or ideologies or attitudes of the plaintiff in this action, but they were designed to show the plaintiff's knowledge of the attitude of the people of this country, or a substantial part of the people of this country towards the matters that were discussed in the questions.

Go ahead and complete it.

(Testimony of Lester Cole.)

Mr. Selvin: And with a view, by that even to show that such attitude was such as to make his conduct, statements and testimony in front of the Un-American Activities Committee of a sort which naturally tended to incur the scorn and contempt of the public and to shock and offend the community.

The Court: All right. I will supplement that by stating that assuming Mr. Selvin's object to be as stated, the matter is one of argument and is not the subject of proof.

I intend to submit to the jury the question as to whether the conduct was such as to shock, insult or offend the community and also as to whether the conduct was such as [643] to prejudice the defendant, his employer, or the motion picture industry in general.

But I do not believe it is the province of this court or of this jury to hear testimony as to whether the conduct has such effect or not, that that is a question to be determined by court and jury from their knowledge of the attitudes of the community of which they are a part, as they will be fully instructed by the court, at the proper time.

Mr. Selvin: Now, this is just an inquiry, your Honor: it is not any additional statement.

The Court: Yes.

Mr. Selvin: Am I to understand that we may argue to the jury, without any specific evidentiary foundation, what we believe to be common knowledge as to public attitudes?

The Court: In my present view, I think so, because otherwise I would have to do one thing or

(Testimony of Lester Cole.)

the other, either instruct the jury that the conduct is such as to shock or is as not to shock, and in either way I would have to take it away from them. And I propose to have them determine whether his conduct had the effect claimed in the clause and in the notice. [644]

Mr. Selvin: Well, the purpose of my inquiry simply is this: and this is merely a rough assumption, if in the course of argument to the jury Mr. Walker or I, whichever one of us makes the argument, should say, "Well, of course, ladies and gentlemen, you all know it is a matter of common knowledge that the great mass of the American public looks with scorn and contempt upon Communists," I don't want to be met with an objection by the plaintiff that there is no evidence of that before the jury, that the evidence was expressly ruled out.

The Court: Well, the point is this, I don't want to rule at the present time on any such offer of proof. I am merely ruling on the questions. You have not offered as yet to prove what Communism stands for or what people believe Communism stands for. When you do that, I am going to rule on it. In other words, your scrapbook which you showed me at the pre-trial, in that other proceedings, has not appeared yet.

Mr. Selvin: No. I understand that, but the addendum which tells your Honor to make the last statement which you made—the addendum which I made to Mr. Walker's statement was in my view designed to bring out just that. If Mr. Cole should say "Yes," he knew the public attitude or that of a substantial

(Testimony of Lester Cole.)

portion of the people to be such as indicated by the questions, we would then have, even by itself and certainly [645] with the other evidentiary material, a foundation for the argument, but, if as your Honor says, it is a matter of argument and not a matter of proof, I want that understood, not from the standpoint of protecting any record or anything, but from the standpoint of protecting Mr. Walker and myself from the objection when we do make the argument, on the ground that there is no proof of the fact and that we are going outside of the facts in making that statement.

The Court: I can't make a ruling, now, to protect you against any argument you are likely to make. I am making a ruling on these particular questions. I have indicated I think the particular inquiry is immaterial. If you want to follow it up by offering evidence as to what the public believes about that, then it is up to you and then I will rule and then of course if I exclude it and say that the jury are to determine whether it is or it is not shocking and all that, then, I couldn't prevent you from speculating, just as I couldn't prevent them from speculating the other way. I intend to define all those terms. In fact, I am going to use that Instruction No. 9. You wasted time, because I had already made one and I used a later Webster's dictionary than you did. I am going to instruct the jury.

* * * *

[646]

Q. Mr. Cole, you have already testified that, on the 19th of September, 1947, you were served with a subpoena to appear at the hearing of the Un-

(Testimony of Lester Cole.)

American Activities Committee in October of the same year. That is correct, is it not?

A. Yes, sir.

Q. And the date is correct, September the 19th?

A. Yes, sir.

Q. At the same time or approximately the same time that you were served, a number of other people were, to your knowledge, served with subpoenas to appear as witnesses before the committee at the same hearing, were they not?

A. I discovered that later.

Q. Amongst the people that were subpoenaed to appear [656] were the people whom you have heretofore testified came to be known as the unfriendly witnesses?

A. To the best of my knowledge, that is the way the members of the Un-American Activities Committee designated them. That is how they first got this term.

Q. I understand and I am not seeking to indicate that by the term there is any particular significance attached as far as this trial is concerned but merely for the purpose of identifying a group who came to be known by that term, and they did become known by that term, did they not?

A. I believe that after Thomas first called them that, the press sort of picked it up.

The Court: It is a phrase that we use in court a good deal to indicate a person who doesn't come voluntarily but comes in answer to a subpoena, and you don't know in advance what he is going to say. There is no opprobrium attaches to it to say a person

(Testimony of Lester Cole.)

is a friendly witness or an unfriendly witness. That is what Mr. Walker means to tell you. Go ahead.

Q. (By Mr. Walker): There was a group of 19 of those men who acted jointly in the matter of employing counsel, is that not correct?

Mr. Katz: Just a moment. We have an objection for the record. We could reach a stipulation that 19 men [657] employed Mr. Kenny and others but we want the record to show we are standing silently by in any action other than as to Mr. Cole. So we want the record to show, preliminarily, our objection on the ground it is immaterial.

Mr. Walker: May I observe at that point, in answer to counsel's remarks, that counsel has already shown in the course of his examination that these attorneys were employed by a group of people; that that group of men authorized them to appear at a meeting with Mr. Johnston, Mr. McNutt and Mr. Benjamin, and that they did have such a meeting and they came back and reported to the group. I am trying to establish, and it has already appeared, that certain people were a part of that group. That is already in evidence.

The Court: I have no objection to going into that but we must avoid bringing in the acts of others into the acts of this plaintiff. Ultimately, we are trying just what this plaintiff did, and whether he did it as an individual or in concert with others is merely an incident.

Mr. Walker: May I state my position with reference to that?

The Court: Yes.

(Testimony of Lester Cole.)

Mr. Walker: I don't think you can dissociate the things that were done by Mr. Cole from the things that were done by these other men, particularly the nine other men who, with Mr. Cole, became known and who have been designated here in [658] the testimony as the 10 men. I think that the significance of what Mr. Cole did is very definitely pointed up by reason of the fact that he was one of a group which acted as, I think the evidence will show, they did act. Now, may I call your Honor's attention to the fact that counsel put into evidence the statement of policy that was adopted at the New York meeting, the Waldorf meeting? It is obvious when you read that statement, as counsel did read that statement to the court and the jury, that that action which is represented by that statement of policy is based not upon the conduct of Mr. Cole alone. It is based upon the conduct of these 10 men. And I say to your Honor that what these 10 men did or did not do is of great significance as a part of this entire situation and as a part of what Mr. Cole did.

The Court: I am not going to argue with you. I am not trying 10 lawsuits. I am trying one lawsuit and the mere fact that it appears that what he did was similar to what others did does not warrant us in this lawsuit going into a detailed examination of what the others did. But the particular question I will allow.

Mr. Walker: May we have the question, Mr. Reporter?

The Court: Yes.

(Question read by the reporter.)

(Testimony of Lester Cole.)

A. No, sir; it is not.

Q. (By Mr. Walker): Is it not true that a portion of [659] that group of 19 acted jointly in the matter of employing counsel?

A. I really couldn't speak for anyone but myself, sir, and I will be very happy to tell how I employed counsel.

The Court: He doesn't want to know how you employed counsel. All he wants is for you to answer the question, which you have answered.

A. I wasn't a member of a group which employed counsel.

Q. (By Mr. Walker): However, it is a fact, is it not, that the counsel employed by you were also the counsel employed by a number of the 19 whom we have identified?

A. Subsequently, as far as I know, the various counsel employed by different men did get together in relation to the cases because they found there was common testimony, since we were designated as the unfriendly witnesses, and a great distinction was made as to friendly witnesses by the committee, the Un-American Activities Committee; and those who were designated as unfriendly witnesses found that they had employed different counsel and that those counsel then did get together in discussing common matters.

Q. And after a certain point and prior to the time of the actual hearing, the counsel, that have been named here as the counsel that went to see Mr. Johnston and Mr. McNutt on that Sunday evening, acted jointly for this group, did they not? [660]

(Testimony of Lester Cole.)

A. Yes; they did.

Q. And at least a part of that group for which they so acted jointly consisted of yourself, Mr. Trumbo, Mr. Maltz, Mr. Bessie, Mr. Biberman, Mr. Ornitz, Mr. Dmytryk, Mr. Scott, Mr. Lardner, and Mr. Lawson, isn't that correct?

A. And more. There was Larry Parks, Lewis Milestone and Irving Nichel and Robert Rossen and Richard Collins, I believe. Yes; that is so. There were 19, at any rate, and Berthold Brecht.

Q. And the names that I gave you, leaving out the names that you added and adding your own name, were those who came to be known as the 10 men and who had been so referred to during the testimony?

A. In Washington? No; they only became the 10 after the hearings. There were 19 right through the hearings in Washington. It wasn't until afterwards that those who were on the witness stand, the other nine—the other nine were not called. The hearings were ended after Berthold Brecht. After Berthold Brecht, they came to an abrupt ending and Mr. Brecht went to Europe.

Q. And those are the people whom I mentioned, with the addition of your name?

A. That is correct, sir.

Q. These attorneys, whom we have heretofore identified, did counsel with you as a group and advised you in regard [661] to the matter of these hearings?

A. Yes, indeed.

Q. Considerable publicity was given, was it not, Mr. Cole, through the newspapers and over the radio,

(Testimony of Lester Cole.)

to the fact that this hearing was to take place in Washington in October? A. Yes, sir. [662]

Q. (By Mr. Walker): Now, after the lawyers whom we have identified did begin to counsel with you as a group, prior to the hearings, did you discuss, with the other persons whom I have identified as the 10 men, the matter of how you would handle yourself before the Committee when you were called as a witness?

A. Well, I did not know exactly what questions—— [663]

* * * *

A. On the Sunday night when our lawyers returned from the meeting with the attorneys and the representatives of the producers, there was a good deal of discussion in regard to the report that was brought back to us. If you will recall, Mr. Walker, in the testimony which Judge Kenny gave and which I said I heard, he reported back to us that our attorneys had presented to the producers' attorneys and representatives the position on the Constitution which we believed was valid and the fact that questions which went beyond that were considered not pertinent by us and the fact, of course, it was testified to, that there would not be any blacklist against any of us and at that time we did discuss this matter, those of us who were in the room at that time.

Mr. Walker: May I have exhibit 4, please?

Q. Now, Mr. Cole, was that the first time that as a group you had discussed the matter of how

(Testimony of Lester Cole.)

you would handle yourselves if called as witnesses before the Committee? A. No, sir.

Q. All right. Then, I will return to my question and I ask you when you first consulted as a group in regard to the [664] manner in which you would testify if called as witnesses before the Committee.

A. I believe that it was a short time before we went to Washington, when some of us discovered that we had lawyers in common and when a great deal of resentment throughout the community and the industry in Hollywood seemed to be aroused at the attempts of this Thomas Committee to gain control over the screen. People, I and others, knowing the kind of questions because of all of the testimony which had been given in the past, in the secret hearings, the charges of alleged Communism, sought the advice of our attorneys to discover what our constitutional rights were. And when people found out, individuals, that they were going to take a similar or a common stand in regard to what they felt may be an invasion of their rights, at such times those matters were discussed among such people who had received subpoenas.

Q. (By Mr. Walker): And amongst those people were the people that I have identified as the 10 men? A. The 19.

Q. But they included the 10, did they not?

A. Yes, they did, sir.

Q. All right. And if you found that you had a common position in regard to this matter, I as-

(Testimony of Lester Cole.)

sume that you found it by discussing the matter among yourselves, is that correct?

A. Certainly, sir. [665]

Q. Yes.

A. And with our attorneys individually, as well.

Q. Yes, but you also discovered it by discussions among yourselves?

A. That is correct.

Q. As I understand you to say, you met at least on one occasion and had a discussion of that kind?

A. Yes, I believe that is so.

Q. Before you went back to Washington?

A. Yes, sir. I know there was, for example, a meeting in the Shrine Auditorium about a week before we went back, at which there were over 5000 people and a number of screen stars and big directors in the motion picture industry, including Gene Kelly, who is under contract with M-G-M, who was the chairman of this meeting at which the 19 of us appeared at that time, along with others, and our attorneys there spoke of the fact that we were going back to defend what we believed were our constitutional rights, that it was our duty to so do.

Q. Now, did you discuss with others or with the 10 men or others of the 19—first, I will ask you with others of the 10, the possibility that you would be asked when you went on the witness stand whether or not you were members of the Communist Party?

A. I think that we were—we had to be asked any kind [666] of questions from that committee.

(Testimony of Lester Cole.)

Q. I understand, but I am asking you in particular, now, whether you did discuss the possibility that you would be asked this particular questions. [667]

A. Well, sir, since I had been referred to in the trade papers in Hollywood in the past as a "Commie" and a "Pinko" and a Communist sympathizer and all of the terms which were placed upon me, it was natural that I would think, knowing that the friendly witnesses were members of this Motion Picture Alliance, which were going to testify, that I would be asked such questions.

Q. Well, you say that you thought that you possibly would be asked such questions. Now I am asking you whether you discussed with others of the ten the probability that you and they would be asked such question?

A. I don't know whether I ever discussed it with any group. I may have discussed it along with all the other people, questions that may have been asked me, by J. Parnell Thomas, this one as well as many others.

Q. You think it is quite probable that you did discuss with the other men in this group of ten or this group of 19—

A. With some of them—

Q. —that such question would be asked you?

A. It is very possible, yes, sir.

Q. And did you indicate to them what your attitude would be in the event that such question was asked?

(Testimony of Lester Cole.)

A. Well, I had discussed with my lawyer formally——

Mr. Walker: Now, just a moment, Mr. Cole. I am going to [668] ask the reporter to read the question to you.

(Pending question read by reporter.)

Mr. Katz: Let the record show our objection to that question upon the ground that it is immaterial.

The Court: Well, I will overrule the objection, solely upon the ground that the wilfullness of the act is a proper subject of inquiry and this cross-examination seeks to show whether there is or not—strike that out. I don't want to comment. I don't want to say what they seek to show. It is based upon the question of whether the act was intentional or not and that is one of the elements upon which the court will instruct the jury, that the conduct of the plaintiff which it is claimed contravened the contract must be wilful and intentional. So I think this bears upon that subject. You may answer the question.

The Witness: I would like to have it repeated, please.

The Court: Mr. Cole, you are not before any administrative committee. You are before the court and our rules are entirely different, and we, for one thing, do not have the freedom that they have. We have a responsibility which they do not have. They are an inquiring body. We are a judicial

(Testimony of Lester Cole.)

body. So, your rights here, while they may be the same—are not the same as they are there, and we have one person here, who is here to protect you and any other witness, and that is the judge of this court. [669]

The Witness: Thank you, sir.

The Court: So if the question is such that you can answer it yes or not, answer it, but be sure that you will be given an opportunity to explain. If it is of a character that you cannot answer it yes or no, then you say that you cannot answer that question yes or no, and then I will rule whether you are to answer it by way of an explanation without giving an answer yes or no, but it is the old rule that if a question can be answered yes or no, the witness should answer it, but must be given the right to explain it, and no one, not even I, can deprive you of the right to explain an answer.

Do you understand that?

The Witness: Yes, sir.

The Court: Very well.

The Witness: Thank you, sir.

* * * *

A. Yes, and I would like to explain that, if I may. [670]

I indicated to them that my attitude would be one of defending what I believed were my constitutional rights at any time when upon my belief and on the instructions that I received from my attorneys, those constitutional rights were being violated.

(Testimony of Lester Cole.)

Q. (By Mr. Walker): Did you indicate to them in discussing the possibility that you would be asked whether or not you were a Communist or ever had been a member of the Communist Party, that you would not in response to that question inform the Committee as to whether or not you were at the time or ever had been a member of the Communist Party?

A. That is a difficult question for me, sir, to answer yes or no, I will try, because——

The Court: Let me reframe it for you. To put it in simple words, did you either in so many words or in substance say to this—we are talking about a meeting——

Mr. Walker: This group of 10 men.

The Court (Continuing): ——to this group, “If they ask me if I am a member of the Communist Party, I am going to say thus and so.” That is what he means.

A. No, I did not say whether I would say yes or no.

The Court: All right.

The Witness: I would like to hear the question. I understood what you said but I would like to hear the question [671] again.

Mr. Katz: The court has reframed Mr. Walker's question.

Mr. Walker: Well, I don't believe that I quite got an answer to my question, your Honor. He may very well respond that he didn't say that in exact words, that he did not say that. I am not going to ask him—— [672]

(Testimony of Lester Cole.)

The Court: Well, I asked him in substance.

Mr. Katz: In substance.

The Court: Read the question again.

All he wants to know is whether you told him, if the question of your being or not being a member of the Communist Party was brought up, what your answer would be.

A. Well, sir, I thought I answered that question by saying that I would attempt in the best ways that I could to point out that any invasion of what I believed to be were the constitutional rights of all persons would be violated by any person inquiring into the political beliefs or affiliations of any person.

Q. (By Mr. Walker): And that that would be in effect your response to such a question asked by the congressional committee?

A. That is correct, sir.

Q. (By Mr. Walker): I am showing you an issue of the *Hollywood Reporter*, Mr. Cole, under date of October 15, 1947, [673] which purports to be, stated in large type at the head, "An Open Letter to the Motion Picture Industry on the Issue of Freedom of the Screen From Politician Intimidation and Censorship," and ask you if you were one of the parties who caused that to be published in the *Hollywood Reporter* of that date.

Mr. Katz: Just a moment, so that our record may be clear, we object upon the ground that it is immaterial, in that this is a lawsuit between Cole and Loew's, arising out of this particular contract.

(Testimony of Lester Cole.)

The Court: All right.

Mr. Katz: And the notice of suspension refers to Mr. Cole's conduct, and if the studio now wants to say that they acted under the producers' policy in November, '46, which referred to 10 men and not under the notice of suspension which refers to Mr. Cole, which is this lawsuit, we are perfectly willing to withdraw our objections, but the producer, Loew's, it seems to us, cannot take the position that we acted under the notice of suspension which referred to Loew's as far as the technical legal position is concerned and then turn around and say that we are talking about the 10 men which is the position which the record shows was taken in New York. So that our objection is that there is a definition of the basis of this testimony so that it can't be said that by our silence we have, as your Honor said, let the barn door be opened. [674]

Our position must be clear for the record. We object not because there is anything in that statement that by any construction can be harmful to our client. We have read it. We are satisfied with it, but we don't want to be in the position where they later on will say, "Well, they didn't object just simply because it was a favorable statement that these men made."

I want the record to show that our objections go to this line of questioning in connection with what other men did, not because what other men did made what Mr. Cole's position was qualitatively

(Testimony of Lester Cole.)

different, but solely in this lawsuit because Loew's suspended Lester Cole under their contract with Lester Cole and not because of any other action that may have been taken by the producers' association.

The Court: All right. All right.

Mr. Walker: Now, I don't propose to introduce that in evidence. I am having the witness identify it. I am introducing it solely for the purpose of showing that Mr. Cole acted with the other men whose names appear here, in putting into the paper an article having the designation which I have read to him.

The Court: Well, I will allow the question to be asked, and I will say to the jury that the object of this inquiry is merely to show that Mr. Cole had done certain things before he actually went to Washington, which you have a right [675] to consider in determining whether his conduct was willful and intentional, because you will be instructed—and I think that both counsel agree that this is the law of California which governs this case, because this case is what we call a diversity of citizenship case, it was filed in the Superior Court and I might as well tell you, because if you should see any legal document here or see the complaint, for some reason or other you will notice it was filed in the Superior Court, and it was removed by the defendant, as they had a right to, to the Federal Court, under what we call the diversity of citizenship, and that is when a person sues a de-

(Testimony of Lester Cole.)

fendant who is an individual, or a corporation, who are citizens of another state, that is a corporation organized under the law of another state, that can be removed to the Federal Court, and this was removed, so that is the law; you will hear a good deal about the law of California in the instructions, because it is governed by the law of California, for that reason, and also because the contract was made in California and was to be performed in California and because under the law of California, the elements of wilfulness and intention may be considered, this inquiry is proper as bearing upon that and nothing else. All right.

Mr. Walker: Now, may it please the court——

The Court: Yes.

Mr. Walker: I am adopting the language used by your [676] Honor in discussion yesterday. The evidence is introduced for the purpose of showing that there was joint action and that the plaintiff must take the consequences of the joint action that was taken in connection with this hearing. As your Honor has said, the conduct——

The Court: Well, the argument that you are to make on it is not material at the present time.

I am stating the legal ground upon which I think it is admissible. What you will argue later on either to the court or to the jury may abide that time. I have overruled the objection. You may proceed.

Mr. Katz: Excepting that the record should not show that, your Honor, I have said that the respon-

(Testimony of Lester Cole.)

sibility of Mr. Cole was the result of anybody else's act. You said just the opposite.

The Court: Ladies and gentlemen of the jury, as I have warned you before, what counsel say to the court in arguing a point is not evidence and you have a right to disregard it entirely and what I say to them is in the same class, unless I specifically address you as I did a moment ago in telling you why this is admitted. I do that merely to explain to you the situation. Counsel, later on, may argue the effect of this testimony. But, ultimately, what the law is, you see, will be told to you by the court, after all the arguments by counsel have been completed, and no statement of [677] counsel's theory on the law, made either now or at the time of any argument, can be considered by you, unless there is a stipulation where they say they agree that this is a fact.

* * * *

The Witness: May I have the question?

Mr. Walker: Have the reporter read it for you. I wonder if the reporter will read the question.

The Witness: Yes, sir. I know the answer to this question is yes.

The Court: The answer is yes. All right. [678]

The Court: Have you identified this?

Mr. Walker: Yes; it has been identified as an advertisement——

The Court: I mean where it appeared.

Mr. Walker: It appeared in the October 15, 1947, issue——

(Testimony of Lester Cole.)

The Court: It is October 16th.

Mr. Walker: I don't have my glasses on. October 16, 1947, issue of the Hollywood Reporter.

The Court: And, to identify it further for the record, it occupies pages 8 and 9 of that issue. All right.

Q. (By Mr. Walker): You have already stated that you were one of the people who was instrumental in having that advertisement placed in the Hollywood Reporter on the date referred to, and was it signed, that is, the original of it, or authorized by the men whose names appear at the end of the advertisement?

Mr. Katz: Just a moment. I think the jury should know what names are attached to it. I suggest, before he is asked as to any part of the names, that the jury have the benefit of knowing what the document is.

Mr. Walker: We have identified it.

Mr. Katz: Why don't you read it?

Mr. Walker: We have identified it as an advertisement, which carries at the head of it, in large print, "An Open Letter to the Motion Picture Industry on the Issue of Freedom [679] of the Screen from Political Intimidation and Censorship."

* * * *

Mr. Walker: I have no objection to offering it and I so [680] offer it.

The Court: They may object. I don't know whether they will or not.

Mr. Katz: No; we don't.

(Testimony of Lester Cole.)

The Court: You may mark that and it may be read to the jury at the proper time.

The Clerk: It is admitted in evidence, your Honor?

The Court: Yes. Do you intend to ask some more questions about it? I will read it.

Mr. Walker: All I want to do is identify the names that appear at the end of the document.

The Court: The entire document is before the jury. Do you want me to read the names?

Mr. Walker: Yes.

Mr. Katz: Yes; the entire document.

The Court: I will read the entire document. You sit down and I will do the work.

The Clerk: Defendant's Exhibit B in evidence.

DEFENDANT'S EXHIBIT B

An Open Letter to the Motion Picture Industry on the Issue of Freedom of the Screen From Political Intimidation and Censorship.

In 1941 Wendell Willkie, as Counsel for the Motion Picture Industry, submitted a letter to the Wheeler-Nye Senate Committee investigating "War Propaganda Disseminated by the Motion Picture Industry." Willkie said this:

"The motion picture screen is an instrument of entertainment, education and information. . . . The impression has now arisen, and very naturally, that one of the hoped for results of the pressure of your investigation will be to influence the indus-

(Testimony of Lester Cole.)

try to alter its policies, so that they may accord more directly with the views of such of its critics as Senator Nye. The industry is prepared to resist such pressure with all of the strength at its command."

And Mr. Willkie wrote further:

"I cannot let pass the opportunity to warn of the very genuine dangers involved in the type of investigation which you are now proposing to start. The radio business is already included in the original resolution. From the motion picture and radio industries, it is just a small step to the newspapers, magazines and other periodicals. And from the freedom of the press it is just a small step to the freedom of the individual to say what he believes."

We honor Mr. Willkie for the clarity and cogency of his statement. The Wheeler-Nye investigation was not successful. For six years the screen remained free of further harrassment. But now there is a new investigation of the film industry, this time the Thomas-Rankin investigation on Un-American activities.

What will the result be? Will the screen remain free—or, at least, as free as it is at present? To our minds the issue is in grave doubt.

We remind our colleagues in the film industry that the screen already suffers partial censorship. This censorship is the direct result of an earlier

(Testimony of Lester Cole.)

witch hunt also allegedly directed at radicals and the "red menace." In the years 1917-1922, in the atmosphere of manipulated hysteria, laws were passed against criminal syndicalism, loyalty oaths were exacted, elected legislators were illegally removed from office because they were Socialists, thousands of Americans were illegally arrested. And during this period film censorship laws were passed to keep the screen free of "subversive influences."

Today the names of Palmer and Lusk are forgotten. The nation protested their witch-hunting activities, the American people repudiated them. The hysteria passed and the arrested ones were set free. . . . But the film censorship laws passed during that period were never repealed.

Palmer and Lusk tried it and succeeded.

Wheeler and Nye tried it, but they faced such united, fighting opposition that they failed.

Rankin and Thomas are trying it today. If there is any doubt about this, let us quote Rankin directly. From the Congressional Record, July 9, 1945: " . . . But I want to say to the gentleman from California that these appeals are coming to us from the best people in California, some of the best producers in California are very much disturbed because they are having to take responsibility for some of the loathsome, filthy, insinuating, un-American undercurrents that are running through various

(Testimony of Lester Cole.)

pictures sent throughout the country to be shown to the children of this Nation."

Which films, we ask? Margie, Pride of the Marines, The Best Years of Our Lives?

Let us be clear. The issue is not the historically phony one of the subversion of the screen by Communists—but whether the screen will remain free. The issue is not the "radicalism" of nineteen writers, directors, actors who are to be singled out, if possible, as fall guys. They don't count. No one of them has ever been in control of the films produced in Hollywood. The goal is control of the industry through intimidation of the executive heads of the industry . . . and through further legislation. The goal is a lifeless and reactionary screen that will be artistically, culturally, and financially bankrupt.

In 1941, before the Wheeler-Nye Committee, Harry Warner said: "I have no apology to make to the Committee for the fact that for many years Warner Bros. has been attempting to record history in the making. We discovered early in our career that our patrons wanted to see accurate stories of the world in which they lived."

In 1941, Willkie said: "The industry is prepared to resist such pressure with all of the strength at its command."

What will the industry say in October, 1947, to Rankin and Thomas? Who will decide what stories

(Testimony of Lester Cole.)

are to be bought, what artists hired, what films released? Who will hold the veto? Who will be in control?

Who?

(Signed)

ALVAH BESSIE
HERBERT BIBERMAN
BERTHOLD BRECHT
LESTER COLE
RICHARD COLLINS
EDWARD DMYTRYK
GORDON KAHN
HOWARD KOCH
RING LARDNER, JR.
JOHN HOWARD LAWSON
ALBERT MALTZ
LEWIS MILESTONE
SAMUEL ORNITZ
IRVING PICHEL
LARRY PARKS
ROBERT ROSSEN
ADRIAN SCOTT
WALDO SALT
DALTON TRUMBO

Q. (By Mr. Walker): Mr. Cole,—

The Court: No. We are going to read this. Sit down. Or do you want to stand up?

Mr. Walker: No.

The Court: This will take some time. I think you had better look at the format or at the set-up.

(Testimony of Lester Cole.)

Can you see it, ladies and gentlemen of the jury? I will have the clerk show [681] it to you—or I will do that afterwards. Can you see from here?

Mr. Walker: Would your Honor like to have me pass it in front of the jury?

The Court: You pass it in front of the jury and then I will read it. Just slide it along.

Mr. Walker: I will start at this end and then return it to the court.

(The jury inspects Defendant's Exhibit B.)

[Defendant's Exhibit B was read to the jury.]

* * * *

Q. (By Mr. Walker): Referring to the article which has just been read by the Judge, I will ask you if, before it was published, the men who signed it agreed upon its publication?

A. Yes, sir.

Q. And upon the wording of it?

A. Yes, sir.

Q. Now, I call your attention, Mr. Cole, to Plaintiff's Exhibit 4, which has been identified as a communication sent by counsel who signed it, being the same counsel that have been heretofore identified as counsel for you, to the Thomas Committee, which is a telegram dated October 19, 1947. Do you recall that telegram?

A. Yes, sir; I do.

Q. And did you know the contents of this telegram at or about the time that it was sent?

(Testimony of Lester Cole.)

A. Yes; I did.

Q. And before you went on the witness stand?

A. Yes, sir.

Q. I direct your attention to the fact that it was sent by the counsel by whom it is signed, and states that it is sent by them as counsel for Alvah Bessie, Herbert [688] Biberman, Berthold Brecht, Lester Cole, Richard Collins, Edward Dmytryk, Gordon Kahn, Howard Koch, Ring Larnier, Jr., John Howard Lawson, Albert Maltz, Lewis Milestone, Samuel Ornitz, Larry Parks, Irving Pichel, Waldo Salt, Adrian Scott, Robert Rossen and Dalton Trumbo. Those are also the men who joined in the advertisement which has just been called to your attention?

A. Yes; they are.

Q. And I also direct your attention to the fact that it is signed by the attorneys as counsel for these men.

A. Yes, sir.

Q. Did you discuss with any of the 10 men the fact that, if you pursued the policy in regard to your testimony that you have indicated in your testimony here today, you might be cited for contempt of Congress?

A. I had no such idea, sir, and I didn't discuss that, no.

Q. You did not discuss that?

A. No, sir.

Q. Did you consider the possibility that, if you were asked the question whether or not you were a Communist and did not inform the committee as

(Testimony of Lester Cole.)

to whether or not, you might be cited for contempt of Congress?

A. At what time? Consider it when?

Q. Prior to your going on the witness stand.

A. No, sir; I did not.

Q. Before you went on the witness stand, Mr. Cole, you had heard the testimony of nine of what we have called the 10 men, had you not?

A. Well, I had either heard it or heard about it. I won't say for sure I was there during the testimony given by the nine of them.

Q. If you were not there every minute during which their testimony was being given, you were there substantially all of the time when their testimony was being given, were you not?

* * * *

A. The answer is yes.

Q. (By Mr. Walker): And you heard not only what each of these nine men said but you heard whatever was said by the different members of the committee in connection with their testimony?

Mr. Katz: We object to that upon the ground it is immaterial.

The Court: Yes. I will sustain the objection.

Q. (By Mr. Walker): I will ask you again, after directing your attention to the fact that you were there [690] substantially all of the time during the testimony of the other nine men was given, whether or not, before you took the witness stand, you had considered the possibility that you would

(Testimony of Lester Cole.)

be cited for contempt of Congress in the event that you did not answer——

Mr. Katz: We object to that upon the ground it has already been asked and answered.

The Court: He brings it down to the particular time now. It is along the same line as the one already answered. You may answer that one.

Mr. Walker: It will be helpful if counsel will let me complete the question.

The Court: I thought you had.

Mr. Walker: I hadn't completed it. Mr. Reporter, will you read it to the point at which the interruption occurred?

(Question read by the reporter.)

Q. (By Mr. Walker): ——and that you did not, in response to a question by the committee as to whether you were a Communist, give the committee the information sought by the question?

A. I considered the possibility but I also remembered vividly that Mr. Eric Johnston had said in previous testimony that the Motion Picture Producers Association would consider it an illegal conspiracy were they to comply with the [691] committee's request, made previously to the testimony and constantly during the time, that these men, whom they considered or alleged to be Communistic, were to be fired. Therefore, my consideration of that was present but it in no way deflected from what I felt personally about my responsibility in relation to any questions, sir, which attempted to

(Testimony of Lester Cole.)

violate what I believed to be the Constitutional rights of citizens.

Q. Did you consider—or let me ask you, first, did you discuss with any of these 10 men, or did any of these men discuss with you, the possibility that, if you or they testified before the committee in the manner in which you have indicated you proposed to do, it might have the effect of making the Congress of the United States unfriendly towards the moving picture industry?

A. No, sir; I did not. I could not believe that this would be the case because my feeling was very definitely as I attempted to say in my statement that I did not believe the people of the United States would, through their Congress or otherwise, tolerate that type of inquisition, and I believe it has been subsequently proved.

Q. Did you discuss with any of the 10 men, or did any of the 10 men discuss with you, the manner in which they would conduct themselves at the hearing, as distinguished from the particular answers that they might or might not [692] give to questions asked?

A. Well, I discussed——

* * * *

A. The answer is yes; there was discussion. [693]

* * * *

Q. (By Mr. Walker): Mr. Cole, you heard the testimony of Mr. Samuel Ornitz and of Mr. Herbert Biberman before the Committee, did you not?

A. I believe I did, yes, sir.

Q. And I will ask you whether you heard this

(Testimony of Lester Cole.)

statement by the chairman of the Committee, which appears at page 419 [695] of the transcript of the hearings:

“The Chair would like to announce that by unanimous vote of the subcommittee, the subcommittee recommends to the full committee that Samuel Ornitz and Herbert Biberman be cited for contempt and appropriate action be taken immediately.”

A. Yes, sir, I heard that or heard of it. I knew of it.

Q. Now, the testimony, this statement was made before you took the witness stand, was it not?

A. Yes, sir.

Q. And now I ask you again, didn't you consider the probability that if you testified as you expected to testify and as you have told us you did, that you would be cited for contempt?

A. If I were called, sir, that I considered the possibility of that, but if you remember, yesterday I said that from the reports and from the way the hearings were going, it was open to question how long the hearings would continue, and so I also considered the possibility of not being called at all.

Q. You did, however, think it was sufficiently probable that you would be called, that you prepared a statement the night before you were to be called, you were scheduled to be called, to be read to the Committee?

(Testimony of Lester Cole.)

A. Well, sir, I would say it was possible and I was going [696] to be ready for any possibility.

Q. Now, you thought it was more than possible, didn't you, Mr. Cole?

The Court: Well, let us not quibble with words. He has admitted that he prepared the statement in anticipation, so whether you call it possible or probable, it doesn't matter; he did admit doing it.

Q. (By Mr. Walker): Did you, Mr. Cole, before any of the ten men who had been identified as such went on the stand, that each of them would ask for permission to read a statement to the Committee?

A. I don't believe so, sir.

Q. You don't think you did?

A. No, sir.

Q. Did you discuss with any of the ten men the fact that you and he would prepare and read a statement before the Committee or ask for permission to read a statement before the Committee?

A. Well, you see, the first of these ten men did not arrive on the stand until the hearings had progressed, I believe, three or four days, and in those three or four days permission to read a statement was granted to all preceding witnesses who requested it, and as a result, the procedure having been established, I know that I took it for granted, as did the others, that this was a procedure which would be permitted. 697] As it turned out, it was permitted only in one instance, one and a half instances.

(Testimony of Lester Cole.)

Q. Now you say you took it for granted as did the others. How did you know that the others took it for granted that they would be permitted to read a statement?

A. Well, sir, not only the newspapers but the radio was full of the hearing which was going on at this time, but many of us were acquaintances previously in Hollywood and we did not arrive there as strangers, we had known each other and these matters, all matters of this sort which were of common interest in regard to the hearing were discussed.

Q. All right, and amongst them was there discussed the matter that they would prepare and read statements to the Committee?

A. I believe that each man decided for himself that he would and it is quite possible—I know that I mentioned the fact, coming on as No. 10 in the hearing, that I was going to read a statement and I made no secret of the fact.

Mr. Walker: Well, let us take a more specific question and see if we can get at it:

Q. Did you know, before Mr. Lawson took the stand, that Mr. Lawson proposed to read, if he were permitted to do so, a statement he had prepared?

Mr. Katz: We object to that on the ground it is immaterial. [698]

The Court: Yes, objection sustained. I think the inquiry has gone far enough. I don't want you to bring—the objection is sustained.

(Testimony of Lester Cole.)

Q. (By Mr. Walker): Did you discuss with any of the ten men or did any of the ten men discuss with you the possibility that if you did not inform the Committee, in response to question as to whether you were or were not a Communist, that that might lead the public or some substantial part of the public to believe that you were or that they were members of the Communist Party?

Mr. Kenny: I object to that, your Honor, upon the grounds that it is immaterial, particularly that that calls for a conclusion. Mr. Cole is not an expert on public opinion.

Mr. Walker: This does not call for his opinion at all. It calls for a matter that he discussed and took into consideration before he gave the testimony that he did give.

The Court: All right. The objection is overruled.

The Witness: May I hear the question?

The Court: Read the question.

(Question read by reporter.)

A. Well, from what I had read of public opinion up to that time——

Mr. Walker: Now, just a moment, Mr. Cole.

The Court: No, no. [699]

Mr. Walker: Just a moment.

The Court: He is asking you a specific question whether you thought——

The Witness: No. He asked did I speak to others, is that correct?

(Testimony of Lester Cole.)

The Court: No, no.

Mr. Walker: Did he discuss with others.

The Court: Discuss with others.

(Question re-read by the reporter.)

A. There was a great deal of discussion as to what might be the result and the discussion was regarding what was being said at that time and what was being said at that time in the editorials, in the New York Herald-Tribune and the New York Times, the Detroit Free Press, the leading newspapers in this country, and they were editorials denouncing the fact that such inquiries were being made. I can particularly recall special comment in the Detroit Free Press, which is a Republican newspaper, saying that the most un-American activity engaged in at the present time was being conducted by this very committee, the Thomas committee itself.

The Court: What he wants to know, alongside of that, if you didn't discuss the possibility that another segment of public opinion might think, might infer from the refusal to answer, that the person who so refuses may be a Communist. That is what he wants, whether that was discussed. [700]

A. That is possible, sir.

The Court: All right.

Q. (By Mr. Walker): Is that as far as you can state with reference to it?

A. As far as I can remember. As I tried to recall, I don't think it was considered particularly

(Testimony of Lester Cole.)

important. The important thing was that the committee was being discredited by the line of inquiry and by the way it was conducting itself in the eyes of the public.

Q. In your opinion?

A. That is what we discussed. That was our opinion, yes, sir.

Q. Well, did you yourself give consideration, before you took the witness stand, to the possibility that if you did not inform the Committee, in response to the question as to whether you were or were not a Communist, that some substantial part of the public might infer from that that you were a member of the Communist Party?

A. Yes, sir. I believe this was a possibility.

Q. And before you took the stand, you considered that possibility?

A. I believe that it would be considered by that section of the public which did not recognize that the Committee was being discredited in the eyes of the American people by its line of activity, yes, sir, it is possible. [701]

Q. Well, did you discuss with any of these ten men, or did any of these ten men discuss with you, the possibility that if some substantial segment of the people inferred from your failure to inform the Committee whether you were or were not a member of the Communist Party, that that would bring you into the scorn and contempt of that segment of the people?

(Testimony of Lester Cole.)

A. Well, the answer is, Mr. Walker, that in whatever discussions I had concerning that subject, I recognized I was a man who was not known before, that my name appears on the screen so small that no one was really concerned with what my political affiliations were, but rather, in the discussion that was held, it was shown that the whole purpose of this Committee, as was said by Mr. McNutt, was not whether or not I was a Communist. The purpose of the hearing was to get control of the screen and to limit free speech, and this was the question which was discussed at great length, and the feeling was, I believe, that we would be able, by pointing it out in the inquisition which was taking place, to prevent that from happening.

Q. So it was then discussed and also was considered by you?

A. I am not sure that—— [702]

Mr. Katz: Just a moment. We object to that.

Mr. Walker: That is his statement. He hasn't answered my question directly.

The Court: Objection sustained. The answer may stand. The jury is to consider what the answer is and there is no use of interpreting it by another question. Proceed to the next inquiry, please.

Mr. Walker: I submit, your Honor, that the witness did not answer my question.

The Court: The witness has answered the question sufficiently to satisfy the standards of law as I understand them to be. Proceed with the next question.

Q. (By Mr. Walker): Did you consider the

(Testimony of Lester Cole.)

possibility, Mr. Cole, that if some section of the public, under the circumstances that I have indicated in my former question, came to believe or inferred that you were a member of the Communist Party, that this might react in a very unfavorable manner upon your personal relations?

Mr. Katz: You mean with his employer or with his wife?

A. I had no personal relations with the public, Mr. Walker.

Mr. Walker: All right. Now, I want to come back to the statement that you made at considerable length a few minutes ago with reference to the fact that you were not known to the public because of the fact that your name appeared in very [703] small letters on any picture with which you had anything to do and where you were entitled to screen credit. Assuming, Mr. Cole, the correctness of your statement in that regard, let me ask you if it is not a fact that prior to the time that these hearings in Washington were had, that the fact that they were to be held received a great deal of publicity through the press and over the radio?

A. Yes. I believe they did receive publicity.

Q. And you have described—you have stated that before you took the stand or before any of the 10 men took the stand, that there had been a number of witnesses who appeared before the Committee?

A. Yes, sir.

Q. In this same hearing?

A. Yes, sir.

Q. Now, is it not a fact, in regard to the appear-

(Testimony of Lester Cole.)

ances of those people before the Committee in this hearing, that there was nationwide publicity?

A. Yes, sir, there was.

Q. And that publicity was by means of news items and by means of radio comment and all the other media of communication? A. That is correct.

Q. Now, is it not a fact that when the first of these 10 men, whoever he may have been, took the witness stand, [704] that the situation which you referred to the other day in response to a question by your counsel then existed in the committee room, that the witness was surrounded by moving picture machines and operators and by photographers with flashlights, in other words, that the committee room contained all the means by which publicity of a nationwide character might be given to what was going on in the committee room? A. Yes, sir. That is correct.

Q. And that same condition existed, did it not, Mr. Cole, with reference to each of the 10 men whose testimony preceded yours at this hearing?

A. It related to all of the witnesses that came on there.

Q. So, it is then true that it existed with reference to each of the 10 men who took the witness stand before you did? A. Yes, sir.

Q. And there was, as a result of this mechanical setup that had been created for the purpose of spreading the information as it was going on in the committee room, great and national publicity with reference to the occurrences there?

A. That is correct, sir.

(Testimony of Lester Cole.)

Q. You testified on the last day that these hearings [705] were held? A. Yes, I did.

Q. They began on the 20th of October and they concluded on the 30th of October, that is correct, is it not? A. That is right.

Q. So that the publicity about which we have been talking occurred over a period of 10 days before you took the witness stand?

A. Well, there was all kinds of publicity. It wasn't publicity in relation to me, Mr. Walker. It was general publicity.

Q. The publicity that I have referred to has been general publicity. A. I see.

Q. And not publicity in reference to you.

A. All right, sir, I just want you to understand.

Q. (By Mr. Walker): And it occurred over this period of 10 days prior to the time that you took the witness stand? A. That is right, sir.

Q. Now, you have described the situation in regard to cameras, moving picture cameras and other photographic apparatus, radio connections and so on, that existed when you took the witness stand?

A. That is right.

Q. And they stayed there during the time that you testified, [706] did they not? A. Yes, sir.

Q. And there was publicity of the same character as there had been in the previous days?

Mr. Katz: Now, just a moment. That is objectionable upon the ground that it asks the witness to compare testimony or compare publicity. We may say that we will rest our case by showing the jury

(Testimony of Lester Cole.)

the exact pictures taken by Mr. Cole's lawyers of just what happened when Mr. Cole was on the stand, so there will be nothing to speculate about. We want the jury to have the exact picture of what happened while he was there.

Mr. Walker: I don't think counsel understands the question. Will you read the question?

The Court: The question may be answered. I think for saving time these questions can be answered in the same manner, the affirmative manner, so there is no harm in asking it again.

The Witness: I would like to hear the question.

(Pending question read by the reporter.)

The Court: Mr. Walker is really asking him the question whether it was of the same character. That doesn't mean that I am going to allow counsel to introduce all the others. Let me understand the question: You mean inside the hearing room, you mean means of broadcast? [707]

Mr. Walker: He has already testified to the means and now I am asking him if the same publicity took place.

The Court: Afterwards?

Mr. Walker: Yes, in connection with his testimony.

Mr. Katz: You mean the same publicity, devices or what?

Mr. Walker: He has already testified that the devices were there.

The Court: All right.

(Testimony of Lester Cole.)

Mr. Walker: Now I am asking him if the devices were used to give the same publicity to his testimony as was given to the testimony of the men who preceded him.

The Court: Oh, go ahead.

A. The same devices were used to give publicity.

The Court: That is all right.

Mr. Walker: That is not the question. I am asking you whether or not the same publicity took place with regard to your testimony.

The Witness: As to whose, Mr. Walker?

Mr. Walker: As to your testimony.

The Court: Well, just a moment.

A. The same publicity, that compares it with other publicity——

The Court: Just a moment. Just a moment. Don't become a lawyer so quick. In justice to the witness, I will say this, that I do not understand your question myself and I [708] doubt if he does. Are you talking about the outside effect? If so, then the question is ambiguous, because he wasn't outside. If you are talking about media that was used, he is saying yes.

If you are asking him if later on, after he got off the stand, whether he heard the results of his testimony or of the publicity that was given, that is an entirely different question. What do you mean by the same publicity? He has answered that the same devices for broadcasting were there and you were not satisfied with the answer. Then you must mean something that neither he nor I understand by the use of the word publicity.

(Testimony of Lester Cole.)

Mr. Walker: I regret very much my inability to use the English language in order to make my question clear to the court and to the witness.

The Court: Well, perhaps we are both deficient in that respect. So we are telling you, so as to give you a chance to make your question simple enough so that he and I can understand it.

Mr. Walker: I shall try to do so.

The Court: All right.

Mr. Walker: This witness has testified to the——

The Court: No. I don't want an argument. I don't want an argument.

Mr. Walker: This isn't an argument. [709]

The Court: I don't want an argument. I am asking you and the witness wants to know what you mean by publicity.

Mr. Walker: I will address my statement to the witness, may it please the court.

The Court: All right. Yes.

Q. (By Mr. Walker): You have testified, Mr. Cole, have you not, to the type of publicity and the degree of publicity that occurred in regard to the testimony of the people that preceded you?

A. I don't remember whether I did or not. I do remember testifying to the devices which were used for publicity.

Q. And, I shall ask you, is it not a fact that the testimony of the people who preceded you received nationwide publicity in the newspapers and over the radio?

Mr. Katz: Now, we are going to object to the

(Testimony of Lester Cole.)

question upon the ground that it is an attempt by indirection to do what cannot be done directly.

The Court: Yes. I will sustain the objection. The matter has been gone into sufficiently. He has described media of communication, what effect it had later on; he was asked whether he considered the effect of it. Now, we are going into an outside domain.

Mr. Walker: Now, I shall ask you whether or not——

The Court: Let us have this understanding. If a man wilfully does an act he is charged with the consequences of [710] the act, if he did it wilfully and intentionally and if he is responsible for an act. The person who is charged with the doing of an act which led to his suspension is charged with the doing of the act, and it may be shown he did it wilfully and intentionally, and he cannot claim that he did not mean it to have that effect nor can you show that he did except by arguing upon the clear effect of his act, because that isn't the question, it isn't what he thought and intended to act. It is what he actually did, wilfully, knowingly, that it might have, that this jury must determine. Ultimately, there is only one question this jury is going to be called upon to determine and that is this: whether in the language of the clause in the contract, what is known as the public relations clause, his conduct was such as will degrade him in society and bring him into public hatred, scorn, ridicule, shock, insult or offend the community, and that is all you have charged him in the notice with.

(Testimony of Lester Cole.)

If you are going to start an inquiry which would bring in the fact of whether he thought or didn't think that what he was doing was contrary to the terms of the contract or not, you are, in the first place, invading the province of the jury and the court, and, second, you are going into a domain which is not the subject of proof and not proper cross-examination in this case.

Mr. Walker: Well, now, may I state the purpose for it? [711]

The Court: No. I don't want you to state the purpose.

Mr. Walker: Your Honor——

The Court: I have been listening for two days to a series of questions. It isn't necessary that you give me the purpose. It is apparent to me what your purpose is.

Mr. Walker: No, but the purpose stated by your Honor is not my purpose.

The Court: I am not giving you the purpose. I am merely giving you what you may prove. I am merely giving you a reason as to why I am ruling. Go ahead, and state your purpose, if it pleases you, you can state it. Go ahead.

Mr. Walker: I am not doing it to please myself. I am doing it for the purpose of trying the lawsuit, your Honor.

The Court: All right. Go ahead and state your purpose.

Mr. Walker: This witness volunteered a statement that he considered that the reaction on the pub-

(Testimony of Lester Cole.)

lic of his testimony would be of little—would be very slight because he was very little known and then went on to give the reasons why he was very little known. I have sought to bring out by a series of questions what I contend to be the fact that if he were not well known before he took the witness stand, that he was well known when he left the witness stand.

The Court: All right. Let us get back to the question.

Mr. Katz: He could have moved to strike it if he did not like the answer, on the ground it was not responsive. [712]

The Court: Just a moment. Let us get back to the question. Had I ruled on the question? What is the question? I may change my mind.

(Question read by the reporter as follows:

“Then I shall ask you, is it not a fact that the testimony of the people who preceded you received nationwide publicity in the newspapers and over the radio?”)

Mr. Walker: It was the question that preceded that.

The Court: Well, I will overrule myself and I will allow the question to be answered. You may answer it, if you know.

A. To the best of my knowledge, yes.

Q. (By Mr. Walker): Did you discuss with any of the 10 men or did any of the 10 men discuss with you, before you took the witness stand, the possibility

(Testimony of Lester Cole.)

that if you testified as you had indicated that you had, that that might lead a substantial part of the public to believe that the motion picture industry was infiltrated by Communists?

Mr. Katz: Now, we are going to object to that question upon the ground that it is completely immaterial. It is not even remotely suggested by the notice of suspension or by the contract.

The Court: I will overrule the objection and when the series of questions are concluded, I think I will repeat a [713] statement that I made outside of the presence of the jury during the argument which I think should be repeated to the jury, so that they understand what relation all this inquiry has upon the issue that we are about to try.

The Witness: I would like to hear the question repeated.

The Court: Read the question.

(Pending question read by the reporter.)

A. No, sir, I did not.

Q. (By Mr. Walker): Did you take that possibility into consideration?

A. No, sir. It never occurred to me.

Mr. Walker: That is the end of that line of examination, your Honor.

The Court: All right. You may step down.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Walker: It is not the end of the cross-examination, your Honor.

The Court: Oh, no. I gathered not.

Ladies and gentlemen of the jury: We are about to take an adjournment. Before giving you the usual admonition, and in order to make the admonition good, relevant, I desire to make the statement which is akin to a statement that was made by the court during the discussion with counsel. [714] And I believe it is important I should make it at the present time although the full scope of the instructions to be given to you on the various phases of the case has not been determined upon. The object of making the statement is to bring before you the meaning of all this inquiry that you have heard in this courtroom. The entire lawsuit turns on the notice of December 2, 1947, which reads, "At a recent hearing of a committee of the House of Representatives, you refused to answer certain questions put to you by such committee. By your failure to answer these questions, and by your statements and conduct before the committee and otherwise in connection with the hearings, you have shocked and offended the community, brought yourself into public scorn and contempt, substantially lessened your value to us as an employee, and prejudiced us as your employer and the motion picture industry in general. By so doing you have violated your obligations under your contract of employment with us and your legal obligations to us as our employee."

And the question you are going to be called upon to determine is whether, in not answering, in the

manner requested by the committee, the question, among others, whether he was a Communist and whether his entire conduct before the committee was of the type forbidden by what has been called the public relations clause, it brought the plaintiff into public scorn and contempt, shocking and offending the [715] community and prejudicing the defendant and the industry.

It happens that the questions related to two matters. One was whether the plaintiff was a member of the Screen Writers Guild and whether he was a Communist, and the notice did not limit the conduct to a particular question. It said, "answer certain questions," and also said "the conduct." As I say, it happens that one of the questions related to whether the plaintiff was or was not a Communist and the testimony that has been offered by both sides deals not with the question of whether he is or was or ever had been a member of the Communist Party or whether he is or was or ever had been a member of the Screen Writers Guild. The evidence that has been offered so far by the plaintiff and the cross-examination of the defendant has related to his acts before the committee and the effects of the acts, as it has been sought to be brought out by the knowledge that he had.

The defendant has not stated in its notice of discharge that he was being discharged because he is or was a Communist. The defendant has not charged in this lawsuit that he is or was a Communist. All they are charging is that his refusal to answer certain questions before the committee, among them, the question as to whether he was or was not a Com-

munist, was such as to subject him to public scorn and contempt, to shock and offend the community and [716] prejudice the defendant and the industry.

You will be instructed further on in the case that, where a contract is in writing and provides grounds for suspending an employee and provides for notice, the employer and the employee are bound by the terms of the contract. And, if the contract provides that certain conduct shall be a ground for suspension and the notice specifies a specific ground, the only matter that can be considered in a trial arising over the suspension is whether the grounds stated in the notice existed or did not exist. In other words, where an employer states as a ground for dismissal certain conduct before the committee, all that a lawsuit arising from that can concern itself with is whether that ground that it stated was true existed or did not exist. So in this lawsuit, the defendant having given his grounds for suspension, the conduct of the plaintiff before the committee, we are limited in this inquiry, and both sides are limited, to only such evidence as bears upon that matter and nothing else matters.

I will add something further. You have noticed from the last question that there is an implication that, in the minds of a portion of the community, a segment of the community — counsel borrowed my phrase, which I, myself, borrowed from the Supreme Court, who used it in conjunction with another type of case—they spoke of an appreciable [717] segment of the community—you will notice that in the question which Mr. Cole answered, and there may be

others of similar import, there is an intimation that a portion of the community would look with scorn and contempt upon the Communist Party of America and upon its members and sympathizers. I may say that you may assume that that is a fact. However, this case arises under California law, because, as I have explained to you before, it is what we call a diversity case, which was removed from the State court, and as the contract was a California-made contract, I also inform you that, under the law of California, it is lawful for a person to be a member of the Communist Party and to register with the Registrar of Voters of a county as a member of such Party. In California, the Communist Party is entitled to participate in elections, including primary elections, and to nominate candidates. And, while under California law, no party which carries on or advocates the overthrow of the Government by unlawful means, or which carries on or advocates a program of sabotage, may participate in the primary election or general election, the courts of California have ruled that the courts do not take judicial notice of the fact that the Communist Party advocates the overthrow of the Government by force or violence and that a registered Communist is not guilty of violation of the State law by the mere fact of membership in the Communist [718] Party.

So, in considering the entire testimony, you must bear in mind these facts in determining whether the conduct was such as to shock the community, bearing in mind at all times that you are not trying here the question whether Mr. Cole is, was or ever has been a

Communist, because that is outside of the province of this lawsuit.

The defendant has not charged him with being that and the defendant has not grounded its suspension upon that ground.

In view of the turn the questions have taken, I thought I should amplify this and repeat it in your presence because it is merely along the lines of statements I made the other day in open court, outside of your presence, and because I am going to give you instructions along the lines I have indicated, some of which counsel will recognize as being instructions, one or another, as proposed for my consideration.

If counsel desire to make any additions to the statement or if you want me to clarify it, I will be glad to do so. I have tried to state both sides of the situation so that the matter will be clear in the minds of the jury.

Mr. Kenny: The plaintiff has no improvements to suggest, your Honor.

Mr. Selvin: I should like to suggest, in the first instance, your Honor, that, since the notice of suspension [719] has been referred to, and the nature of the instruction limiting the jury's consideration to the terms of that notice has been indicated, that it should be called to the attention of the jury at this time.

The Court: I will be very glad to do it. I thought, in reading your notice, I had practically included all.

Mr. Selvin: I understand the portion which you read is not the entire notice, your Honor, and I thought, in view of your Honor's general remarks

which have been made, that it should be called to the attention of the jury that that notice went on to recite the period of the suspension and that it would exist until such time as Mr. Cole had purged or acquitted himself of contempt or had sworn that he was not a Communist.

The Court: I will be glad to read that.

Mr. Kenny: I think we will be content with it if your Honor will inform the jury what the effects of the suspension will be.

The Court: No; I won't do that. First, I will read to the jury at this time——

Mr. Katz: I think at the same time it will be proper to point out that there is no condition in the contract which required Mr. Cole to take an oath that he was a Republican or a Democrat or a Socialist. That might be pointed out.

The Court: No. [720]

Mr. Selvin: There is one other thing, that I suppose relates to the technical, legal phases of the action rather than matters of fact for the consideration of the jury. Your Honor opened a statement with a remark to the effect that the entire lawsuit depends upon the terms of the notice of suspension. Your Honor, of course, is aware of our contention made in our brief with respect to the legal phases of the general breach of the contract.

The Court: But that is not a phase that the jury will have anything to do with. It is my phase of it. I am not telling the jury to do anything I have to decide. I am telling them what they have to decide.

Mr. Selvin: We simply didn't want to be in the position of acquiescing by our silence.

The Court: Oh, no. I am not limiting the scope of the inquiry which I have to go into. The jury have already learned, after they decide these questions, I still have to hear additional testimony if either side desires to present it and, ultimately, determine what kind of a judgment to render, because this is something not novel, because it has existed in California for over 25 years, but it is new so far as the experience of the jurors is concerned.

Ladies and gentlemen of the jury, I think the best way to satisfy both sides and satisfy myself chiefly is to read to you, without comment, the clause which has been referred [721] to as the morals clause, and then read to you additional portions of the notice. The clause of the contract, around which this lawsuit turns, reads, "The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general."

I will say that all of these words in their legal effect will be clearly defined to you so that you will have an idea of what they mean when they say things like "shock a community," and who the community is. Those will be explained to you fully in the instructions to be given you at the close of the case.

The notice was dated December 2nd, was addressed to Mr. Cole, and had the salutation, "Dear Mr. Cole." Then follow the two paragraphs which I have already read, one beginning, "At the recent meeting" and so forth, and the next paragraph "By your failure." Then, following this, we have this, "Accordingly, and for good and sufficient cause, this is to notify you that we have elected to suspend your employment and payment of your compensation under your [722] contract of employment with us dated December 5, 1945, as amended, commencing as of December 3, 1947, and continuing until such time as you are acquitted or have purged yourself of contempt of the Congress of the United States and you declare under oath that you are not a Communist. This action is taken by us without prejudice to, and we hereby reserve, any other rights or remedies which we may have." And then it is signed, "Very truly yours, Loew's Incorporated by" the treasurer.

I will make no other comment than to say that the entire lawsuit turns around this clause in the contract and this notice, and that all of the testimony that has been offered so far and the testimony that will be offered will have to have bearing just upon that particular question, whether this clause has been violated by the conduct of the plaintiff, not his conduct in general but the particular conduct before the committee, as the notice says. [723]

* * * *

(The following proceedings took place in chambers. Counsel were present as before.)

The Court: Bring in the clerk. And, Mr. Reporter, in all of these conferences, I want the record to show they are held in chambers in the presence of both counsel and, also, the clerk.

Mr. Kenny: We will stipulate the clerk is present.

The Court: We will have him brought in.

Mr. Kenny: I guess we should have Mr. Cole present.

The Court: Oh, no; this isn't a criminal case. Mr. Walker desires to formulate some questions to address to Mr. Cole, and it has been suggested that the questions be stated for the record, outside of the presence of the jury.

Mr. Katz: Is it so stipulated, Mr. Walker?

Mr. Walker: So stipulated.

Mr. Katz: We so stipulate.

The Court: All right.

Mr. Walker: I am going to ask a question, to which I anticipate an objection, and I will ask that, before an answer is made, I be given an opportunity, before the objection, to state an additional basis for the question, which has not heretofore been stated. "Are you a member of the Communist Party?" [724]

Mr. Katz: To which we object upon the ground it is irrelevant and immaterial for the reason, among others, that the notice of suspension itself assigns as a cause for the suspension certain conduct before the House Committee, and an asserted refusal to answer questions does not assert that Mr. Cole was or was not a member of the Communist Party; upon the further ground that the record already shows that, insofar as this employer is concerned, out of the lips

of the principal officers of this employer, not contradicted, they have declared that, insofar as employment at Loew's was concerned, it did not make any difference to them that Mr. Cole was or was not a Communist or was or was not being charged with being a Communist; and upon the final ground that, in the light of the fact that the suspension does not specify as a ground therefor the claim that Mr. Cole was a Communist or was not a Communist, any inquiry into that area is not germane to any issue which the court or the jury must ultimately pass upon.

Mr. Walker: I should like to state that, in addition to the bases which I have before stated as justifying the asking of this question, Mr. Cole has now testified, since these grounds were before stated, that in conducting himself as he did before the Congressional Committee and in responding as he did to the question by the Committee as to whether or not he was taken or at any time had been a Communist, Mr. [725] Cole stated that his conduct before the Committee in its entirety, including his handling of this question, was due to the fact that he was protecting not only his own constitutional rights but the constitutional rights of all of the people of this country. And I think that this is a perfectly proper question to be asked for the purpose of indicating that he was not seeking, as he said, to protect the constitutional rights of the people of this country but that he had reasons of his own, that were personal to him, for not answering the question.

The Court: The record which was made of the conference at the bench yesterday contains a full

statement of the reasons why I feel that the question is improper and outside of the scope of the inquiry before this jury. I am still of the same view and I do not think that the statement by Mr. Cole on cross-examination, to which counsel has adverted, is of such scope as to warrant an inquiry into his actual beliefs as to Communism.

Mr. Walker: "Wasn't your real reason——"

Mr. Katz: Just a minute. Is the objection sustained?

The Court: The objection is sustained.

Mr. Walker: "Wasn't your real reason for failing to state, in response to the referred to question of the Committee, whether you were a Communist, because of your unwillingness to admit that you were a Communist rather than for [726] the reasons that you have heretofore assigned for your conduct?"

Mr. Katz: We object to that question on the ground it is immaterial, argumentative and incompetent.

The Court: The objection is sustained. I am also of the view that this is an attempt to bring before the jury the fact, if it be a fact, with which the court is not familiar, that the plaintiff may be a Communist, and, assuming that he should answer the question in the affirmative as to being such Communist, it not having been given as a ground for the suspension, it cannot be inquired into in this lawsuit. And, furthermore, I am also of the view that, if he should answer it in the negative, it would open up the question of proof and we would be trying his membership in the Party, which is absolutely alien to the inquiry which

is before the jury or before the court, for that matter. And I want to state for the record, so that these questions will not be repeated, I am also of the view that this inquiry is improper even before the court, assuming that there may be additional testimony offered which does not go before the jury, which happens in cases of this character. There may not be any. You may be willing to submit it on the same facts and different arguments. But, on the assumption that there is a possibility in a case of this character of additional testimony being offered to the court alone, I rule [727] now that these questions are not proper and that the evidence they seek to elicit is not within the issues either framed by the pleadings or scope of the inquiry, as laid down in the trial of the cause. I made it broad enough so as to cover any possible contingency that may arise.

Mr. Walker: I take it your Honor is saying it is not proper in the sense it is not relevant?

The Court: I corrected myself by stating that they are not within the issues and they are irrelevant and immaterial, as not bearing upon the issues of the case.

Mr. Walker: I just didn't want an implication that there was a charge of improper questioning upon the part of counsel.

The Court: Oh, no. Let's change that word. Go back to that, Mr. Reporter, and I will change it where I say "not proper." Let's use the classical phrase, incompetent, irrelevant and immaterial. [728]

* * * *

(Thereupon the following took place before the court and jury, in open court:)

* * * *

LESTER COLE

the plaintiff herein, being previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination—(Continued)

* * * *

[730]

The Witness: What was the question?

(Question read by the reporter as follows:)

(“Q. In your testimony before the Committee you did not disclose whether you were a member of the Screen Writers’ Guild?”)

Q. (By Mr. Walker, continuing): Isn’t that true?
A. Yes, sir, that is.

Q. And in your statement which was presented to the Committee and which you did not read but to which you referred in your testimony before the Committee, you did not disclose directly whether you were a member of the Screen Writers’ Guild, isn’t that true?

A. I referred to my activities within the industry in relation to the Screen Writers’ Guild. [731]

Q. As appears by your statement?

A. That is correct, in my statement.

Q. Now as a matter of fact, Mr. Cole, there is no secret as to whether or not you were at any given time or are at this time a member of the Screen Writers’ Guild, is there?

(Testimony of Lester Cole.)

Mr. Katz: We object to that upon the ground that it is immaterial.

The Court: Yes. I think we are getting to a too argumentative stage which isn't necessary even under the rawest scope of cross-examination. I will sustain the objection.

Q. (By Mr. Walker): I will show you the deposition, Mr. Cole, the same deposition to which we have referred on various occasions and I refer you to page 47, line 17, and ask you to read from line 17 to and including line 23.

(The witness examines said deposition.)

A. Yes, sir.

Q. Did you so testify? A. Yes, I did.

Q. In response to a question by Mr. Selvin which appears in the portion of the deposition to which I have called your attention?

A. That is corerct.

Mr. Katz: Are you going to read it?

Mr. Walker: Yes—I don't know whether I am going to [732] read it. You are going to object and then I shall find out whether I am going to read it.

Mr. Katz: I would like to show the court the portions referred to, showing that it covers the very matter which the court has already ruled to be immaterial.

The Court: All right.

Mr. Katz: May I just hand it up to the court?

Mr. Walker: Yes. I am sure you will show him that part.

(Testimony of Lester Cole.)

Mr. Katz: The part marked, Judge Yankwich, on page 47.

The Court: All right.

(Mr. Katz handed copy of said deposition to the court.)

Mr. Katz: Now, our objection is that you have already ruled that that question—the questions there asked are immaterial.

The Court: Well, I rule again it is immaterial. The question of whether he was a member of the Screen Writers' Guild or not is not before the court.

Mr. Walker: I am not introducing this for the purpose of showing that he is a member of the Screen Writers' Guild, but for the purpose of showing that there is no secrecy in regard to it and that the witness did not on this occasion at least hesitate to answer the question.

The Court: Well, it is immaterial to this jury whether he answered one question and did not answer the other. They [733] are not concerned with that. They are concerned with only one question—

Mr. Walker: He did not answer either question, your Honor.

The Court: Well, it is not material if he did or did not. They are to determine whether the conduct not only in refusing to answer but his entire conduct comes within the prohibitive clause; and whether he chose to answer one question and not another is not material to this case.

Mr. Walker: And may I state that it is offered for the purpose of showing what I believe to be

(Testimony of Lester Cole.)

something that has a bearing upon his conduct before the Committee in connection with this question?

The Court: Well, you are entitled to your belief. I, as the judge of this court, hold that it is not germane to the inquiry, and it is incompetent, irrelevant and immaterial, to use the classic words.

Mr. Walker: I contemplated some further questions along the same lines, but in view of your Honor's ruling I shall not ask them.

The Court: All right.

Q. (By Mr. Walker): Mr. Cole, in connection with the questions which I am about to ask you, I address your attention to certain testimony which you gave in your deposition and which you have already identified as testimony which you [734] gave at the time your deposition was taken, and ask you to refer to page 162, line 19, and I indicate to you that this was a conversation or a portion of a conversation which was had on the train with Mr. Mayer on your way back from New York after you had testified before the Un-American Activities Committee:

"He," referring to Mr. Mayer, "was angry, and he said there had to be some way found to straighten out the situation."

And I refer you to page 163, lines 11 to 18:

"He," again referring to Mr. Mayer and relating this same conversation on the train, "was obviously wrought up, and, I would say, anything but calm during this entire conversation. His attitude toward me, personally, was one of extreme friendliness and a great deal of sympathy for me and, I might say, for himself, for the position in which he found him-

(Testimony of Lester Cole.)

self. He hoped that whole matter would blow over, somehow. He didn't know how."

And now, to page 160, line 25.

Mr. Katz: On what page?

Mr. Walker: 160.

Q. (Continuing): There I indicate to you that you are dealing with a conversation that you had with Mr. Strickling on the train on your way back from New York to Los Angeles.

The Witness: Yes. [735]

Q. (Continuing) By Mr. Walker: Line 25, "Mr. Strickling told me that Mr. Mayer was terribly upset with the results of the hearing."

Then, if you will look on page one hundred and sixty—

Mr. Katz: Will you finish that question or the next one? It just leaves it dangling in midair, "of the hearing."

Mr. Walker: I will be happy to do it.

Mr. Katz: I wish you would do so.

Mr. Walker: It has been read before.

Mr. Katz: All of this has.

Mr. Walker: That is right, it has been read before.

"We discussed how badly he was treated by the Committee. He felt outraged and humiliated by the brusque, cavalier manner, rude manner in which they shuffled him around, and finally ignominiously brushed him aside."

And I direct attention to the fact that Mr. Cole agreed with me that the word "them," in line 4, should be read "him."

Mr. Katz: You have it correctly.

(Testimony of Lester Cole.)

Mr. Walker: Q. (Continuing): Then, if you will look at a continuation of something that I indicated to you as being a continuation of this same conversation with Mr. Strickling, page 161, line 26, beginning at the end of line 26:

“As I stated before, Mr. Strickling said he was terribly upset, particularly about the effect of this on Mr. Trumbo [736] and myself, and that Mr. Mayer would like to talk to me about the situation.”

Then, if you will drop down on that same page to line 22 and I indicate to you that this was a continuation of the same conversation with Mr. Strickling, “Mr. Strickling at the time said”—

* * * *

[737]

Q. (Continuing): Line 22, page 162, and continuing the same conversation with Mr. Strickling:

“Mr. Strickling at the time said that Mr. Mayer was terribly concerned with the situation in regard to myself and Mr. Trumbo and said that he”—

And you corrected me or you indicated that the “he” referred to Mr. Strickling, or I shall read it that way:

“and said that Mr. Strickling was seeking some formula of public relations whereby we could, Mr. Trumbo and myself, get out of this; wasn’t there some statement that we could make of some sort which the studio could either publicize in some way, or do something which could overcome what he felt was a bad press, and that he wanted me to give it some thought and then when we got back to the studio that we would get together and see what could be worked out along those lines.”

(Testimony of Lester Cole.)

Now, that is a particular testimony to which I direct your attention in your deposition. [739]

And I call your attention to your testimony before the committee, at page 488, and the question addressed to you by the chairman a little below the middle of the page.

“The Chairman: All right. There is an election there. Now answer the question are you a member of the Communist party?

“Mr. Cole: Can I answer that in my own way? May I, please? Can I have that right? Mr. McGuinness was allowed to answer in his own way.

“The Chairman: You are an American, aren't you?

“Mr. Cole: Yes; I certainly am and it states so in my statement.

“The Chairman: Then, you ought to be very proud to answer the question.

“Mr. Cole: I am very proud to answer the question and I will at the times when I feel it is proper.” You recall that testimony? A. Yes; I do.

Q. Now, Mr. Cole, it is already in evidence and you have heard the evidence to the effect that the so-called policy statement, which originated at the meeting at the Waldorf-Astoria Hotel in New York, was published widely in the papers on the 26th of November, 1947. You have heard that statement?

A. Yes; I have. [740]

Q. And you are familiar with that statement, of course?

A. Yes; I am. I couldn't quote it but I know there is such a statement as that.

(Testimony of Lester Cole.)

Mr. Walker: May I have the copy which you have?

Mr. Katz: Yes.

Mr. Walker: Mr. Katz, I think you stated you wanted me to produce the copy of this statement in evidence.

Mr. Katz: You are using it now. You may have it.

Mr. Walker: You will stipulate to the fact this is a correct copy of the policy statement?

Mr. Katz: Yes; I certainly do; a statement of the policy adopted at that meeting in New York on November 27th.

Mr. Walker: Yes. I think, Mr. Katz, it was published on the 26th.

Mr. Katz: I will accept that statement.

Q. (By Mr. Walker): You read that statement, did you not, Mr. Cole, at or about the time that it came out? A. Yes; I believe I did.

Q. A portion of that reads as follows, and I shall read any additional part that Mr. Katz or any of your other attorneys desire read. Mr. Katz requests that I read the entire statement.

Mr. Katz: Since you want to read parts of it, I think it would be better to read it all, as it is very brief.

The Court: All right. Go ahead. [741]

Mr. Walker: "Members of the Association of Motion Picture Producers deplore the action of the 10 Hollywood men who have been cited for contempt by the House of Representatives. We do not desire to prejudge their legal rights but their actions have been a disservice to their employers and have im-

(Testimony of Lester Cole.)

paired their usefulness to the industry. We will forthwith discharge or suspend, without compensation, those in our employ and we will not re-employ any of the 10 until such time as he has acquitted or has purged himself of contempt and declares, under oath, that he is not a Communist. On the broader issue of alleged subversive and disloyal elements in Hollywood, our members are, likewise, prepared to take positive action. We will not knowingly employ a Communist or a member of any party or group which advocates the overthrow of the Government of the United States by force or by any illegal or unconstitutional methods.

“In pursuing this policy, we are not going to be swayed by hysteria or intimidation from any source. We are frank to recognize that such a policy involves dangers and risks. There is a danger of hurting innocent people. There is a risk of creating an atmosphere of fear. Creative work at its best cannot be carried on in an atmosphere of fear. We will guard against this danger, this risk, this fear.

“To this end, we will invite the Hollywood talent guilds to work with us to eliminate any subversives, to [742] protect the innocent and to safeguard free speech and the free screen wherever threatened.

“The absence of a national policy established by Congress with respect to the employment of Communists in private industry makes our task difficult. Ours is a nation of laws. We request Congress to enact legislation to assist American industry to rid itself of subversive, disloyal elements. Nothing subversive or un-American has appeared on the screen

(Testimony of Lester Cole.)

nor can any number of Hollywood investigations obscure the patriotic services of the 30,000 loyal Americans employed in Hollywood, who have given our Government invaluable aid in war and peace."

Mr. Katz: So the record may be clear, the people referred to as "we" in the statement which you have now read into the record—the "we" includes Loew's as well as a great many other motion picture producers, does it not?

Mr. Walker: So stipulated. That is the testimony.

* * * *

Mr. Walker: Will you stipulate, Mr. Katz, that this is a correct, in fact a photostatic, copy of a document designated "Statement", and purporting to be signed by Lester Cole?

Mr. Katz: So stipulated.

Q. (By Mr. Walker): Mr. Cole, if you will look at the deposition which is before you, you will find a photostatic copy, which is identical, Mr. Cole, is it not, with the photostatic copy concerning which your counsel stipulated a [744] moment ago? Do you find it, sir? A. Yes; I do.

Q. Is that a statement, Mr. Cole, which was prepared by you? A. Yes; it is.

Q. And was it sworn to by you at the time indicated thereon, before a notary public?

A. Yes, sir; it was.

Mr. Walker: I offer this in evidence, your Honor.

Q. May I ask when you prepared it?

A. I believe on the date—

Q. That it bears?

(Testimony of Lester Cole.)

A. —that it bears, November 28th; that is correct.

Q. You prepared it after you had seen the statement of policy to which I called your attention?

A. Oh, yes, sir.

* * * *

The Court: All right; admitted. It may be received.

The Clerk: Defendant's Exhibit C in evidence.

EXHIBIT C

[Metro-Goldwyn-Mayer Pictures Letterhead.]

November 28th, 1947

STATEMENT

On October 30, 1947, I appeared as a witness in Washington, before the Thomas-Rankin Committee. In a prepared statement, under oath, I was refused permission to say that I was a loyal American citizen, who upheld the Constitution of the United States, who did not believe in violence and force to overthrow our government, and who was not an agent of a foreign power.

Since childhood, in our public schools, I have given my oath of allegiance. I always will, and now do so again:

I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one nation indivisible, with liberty and justice for all.

In taking this pledge, I further solemnly swear that I will continue to resist, with all my strength,

(Testimony of Lester Cole.)

under all pressure, economic and social, the current drive to subvert this pledge, in spirit if not in letter, to read: "I pledge allegiance to the Thomas-Rankin Committee, and to the anti-democratic forces for which it fronts; one nation divided, with fear and insecurity for all."

/s/ LESTER COLE.

Subscribed and sworn to before me this 28th day of November, 1947.

(Seal) /s/ LAURA DE WARING,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires May 30, 1949.

Q. (By Mr. Walker): What did you do with this statement [745] after you had prepared it and sworn to it, Mr. Cole?

A. I believe I made three copies of it and had them all stamped by the notary public. I then sent one to Mr.—I can't think of the name but the publicity agent referred to in the document here.

Q. Mr. Strickling?

A. Mr. Strickling. And I sent one to Mr. Mayer and I believe I sent a third—well, I think that is all. I am not sure. It was two or three. I don't remember. I may have prepared a third but I really don't recall.

Q. Mr. Mayer, Mr. Strickling and you think a third? A. Yes, but I am not sure.

Q. Mr. Mannix?

A. I really don't remember. I am not sure.

* * * *

[746]

(Testimony of Lester Cole.)

[Defendant's Exhibit C was read to the jury.]

Q. And, as you have stated, sworn to by you on the 28th day of November, 1947?

A. That is correct, sir. That is my statement.

Q. Now, Mr. Cole, the statement to which you referred there is the statement which has heretofore been introduced in evidence as the statement which you asked the Committee to permit you to read?

A. That is correct, sir. That is my statement.

Q. Now, Mr. Cole, the statement to which you refer there is the statement which has heretofore been introduced in evidence as the statement which you asked the Committee to permit you to read and which the Committee did not permit you to read?

A. That is correct.

Q. I call your attention now, Mr. Cole, to the fact that this statement does not contain or this affidavit does not contain any statement as to whether you are or are not a member of the Communist Party. And I now ask you this. Remembering that you had been charged on various occasions, as you have testified, with being a member of the Communist Party, and remembering that on the train Mr. Strickling had told you that Mr. Mayer was terribly upset over the results of the hearing, and that Mr. Strickling had told you, as I have just shown you in your testimony, that Mr. Mayer was concerned with the situation in regard to you and Mr. Trumbo, and that Mr. Strickling was seeking some formula whereby you and Mr. Trumbo could get out of this, that being his expression, and that Mr. Strickling

(Testimony of Lester Cole.)

was asking or did ask you then wasn't there some statement that you could make which the studio could either publicize in some way or wasn't there something which you could do to overcome what Mr. Strickling felt was a bad press, and remembering, in addition, that the statement of policy, following the Waldorf meeting, which had [748] been publicized two days before, and which you had read before you prepared this statement, contained the statements that it did as to the proposed action in regard to the ten men; remembering your statement before the Committee that you would answer the question as to whether or not you were a Communist or a member of the Communist Party at a time which you deemed proper, I ask you now wasn't this a proper time and a proper place in which to make the statement as to whether or not you were a Communist?

Mr. Katz: We object to that on the ground that it is not a question. It is an argument.

The Court: I think I will allow the answer to be given, remembering that it is not a question of whether he is or is not or whether he was or was not, but the question relates to the proposition only as to whether some statement with relation to the subject should have been made at the particular time. I think the witness may answer that. It goes to his state of mind, not to the fact. Again, I will instruct the jury, as I stated before, the question before the court is not whether he is or is not a Communist or whether he was or was not a Communist at all. The only reason why this is brought in is because his appearance before the Committee was charged as a

(Testimony of Lester Cole.)

ground for his suspension and his refusal to answer this particular question is given as the ground for suspension. [749]

Mr. Walker: May I request the court to instruct the witness to answer the question directly and make any explanation he has afterwards?

The Court: I have a standing instruction to that effect and, unless he violates it or indicates to the contrary, it will be assumed that he will answer in that manner.

The Witness: Yes, your Honor; I received your instruction to that effect. My answer is, categorically, no. And I would like to explain.

The Court: Go ahead and explain.

The Witness: It was my feeling at the time that the statement of policy of the Producers came out that they were being swayed by their fear of the Thomas-Rankin Committee; that they had made personally to me on two occasions and given me assurances that they didn't care what my politics were, what political affiliations I may or may not have had; that my job was secure with them. There was at no time any indication from the Producers during the hearings that they would, directly or indirectly, instruct me as to how to answer on the stand. During the entire period of time which passed from the moment when I got my subpoena until I wrote this statement, during that entire period, nothing was said to me as to how I should or should not conduct myself in relation to my contract. I was addressing you, Mr. Walker.

The Court: Are you finished? [750]

(Testimony of Lester Cole.)

The Witness: No, sir.

The Court: Go ahead.

The Witness: And that, as before the Thomas Committee, I felt it was a question of really needing an attempt to explain my position, where I would not be under the authority of economic boycott and force to give up what I felt was an American right, so I felt that either to conform with the point of view which was expressed not merely by my employer but by an industry in concert, to oblige a committee for which I had no respect—when I saw an industry of this sort and its power bow before a committee for which I had contempt in the way that they had conducted themselves before the American people, I felt that I wanted to make a statement of this kind, which I expressed as best I could at that time. And, incidentally, I would like to say that this statement, I felt rather ironically, was—or, rather, that, since Mr.—the publicity agent, Mr. Strickling, had on occasion asked for a statement, that this served two purposes, if Mr. Strickling or anyone else cared to publicize it; that it answered his request for a statement from me and that, further, it was, in a sense, an answer, as I felt, in regard to the, not directly but indirectly—at any rate, they had my attitude on what was not a direct personal charge against me by the Motion Picture Association or by my employers, but was merely a general statement, and that this was my reply. [751]

(Testimony of Lester Cole.)

Q. (By Mr. Walker): Have you completed your statement?

A. That is approximately it; yes, sir.

Mr. Walker: That is all. [752]

Redirect Examination

By Mr. Katz:

* * * *

[753]

Q. (By Mr. Katz): To go back to some matters that were touched upon preliminarily, Mr. Cole, you recall that you were asked by Mr. Walker in connection with the work you did upon your return to Hollywood from Washington?

A. Yes, I recall that.

Q. Now, did you continue to work every day following your return, on the picture "Zapata"?

A. Yes, I did.

Q. Now, were you told at any time during the month of November, by the studio, that you were to be available or were available for some assignment other than the "Zapata"? A. No, sir.

Q. Did Mr. Cummings or Mr. Thau or Mr. Mayer, prior to December 3rd or any other time, tell you that your assignment on "Zapata" had concluded and you were to be [754] available for another assignment? A. No, sir.

Q. Now, on what day of the week were you paid at that studio? A. On Wednesdays.

Q. Now, on the week ending November 8th, 1947, were you paid by Loew's, Incorporated?

Mr. Selvin: We object to that upon the ground

(Testimony of Lester Cole.)

it is immaterial and not proper redirect and not within the issues.

Mr. Katz: There was some suggestion in connection with the examination by Mr. Walker concerning the matter of him being taken off of an assignment, and it is also the problem that we have before the committee, in condonation of the matters. We have the right to show what happened after the event, and it goes to both of the matters.

The Court: Objection overruled.

Q. (By Mr. Katz): Did you receive your compensation on November 8, 1947, from this Loew's Incorporated? A. Yes, I did.

Q. For the week ending November 15, 1947, were you compensated? A. Yes, I was.

Q. For the week ending November 22nd, 1947, did you receive your pay check? A. Yes, I did.

Q. Now, with respect to the compensation that you received for the week ending November 22, 1947, that is about three or four weeks after you testified, were you paid at the lower contract rate or were you paid at the higher rate for the new option?

A. At the higher rate for the new option.

Q. That is, for the week ending November 22, 1947, you were paid at the higher option rate, is that correct? A. That is correct, sir.

Q. For the week ending November 29, 1947, at what rate were you compensated by this studio?

A. At the higher rate, sir.

Q. That is at the increased option rate, is that correct? A. That is correct.

Q. And when you were closed out on December

(Testimony of Lester Cole.)

3rd, after this notice, did you get the few days' pay at the higher option rate? A. Yes, I did.

Q. Now, at any time while you were in Washington, between October 29, 1947, and October 30, 1947, when you testified, did Loew's, Incorporated, or Mr. Maurice Benjamin, their attorney, or any representative of theirs, give you any instruction as to how you should or should not conduct yourself before this committee? [756]

A. No, sir. They did not.

Q. Before you testified on October 30th, 1947, another employee of Loew's, Incorporated, Mr. Dalton Trumbo, had testified, had he not?

A. Yes, sir, he had.

Q. Mr. Dalton Trumbo has been identified I believe as one of the 10 or one of the 19?

A. Yes, he was.

Q. He testified before you testified, did he not?

A. I believe three days before.

Q. Between the time that he testified and the time you testified, did Loew's come to you and make any complaint or statement about either the way Trumbo had testified or advising you as to how you should or should not testify?

A. No, sir. They did not.

Q. You know, do you not, that Mr. Maurice Benjamin, attorney for Loew's, was present at these hearings substantially during all of the time that they occurred, you saw him frequently in the hearings? A. I saw him there. [757]

Mr. Selvin: Is there any question about it? I will stipulate that he was there all the time.

(Testimony of Lester Cole.)

Mr. Katz: They will stipulate that he was there all the time. Thank you. And I accept the stipulation.

* * * *

[758]

Q. (By Mr. Katz): You were asked by Mr. Walker certain questions about what you had in mind before you testified on October 30, 1947. Were there any other matters that you considered and had in your mind in addition to those about which he specifically interrogated you? A. Yes, there were.

Q. Will you tell us what they were?

A. Well, for one thing, there was quite a bit of discussion and a good deal of gratification in the fact that on [760] October 22nd, I believe, or 23rd, Governor Paul McNutt, the special counsel for the producers, had in effect taken a position which had supported the position taken by myself on October 16th in the full-page advertisement which was introduced as testimony here earlier. Specifically, if you will recall that we had—

The Court: Just a moment. I think that is a sufficient answer. Furthermore, that has been gone into. He has already stated on direct examination that in acting the way he did, he knew that and that statement of McNutt's was introduced, so you are going over the same thing.

* * * *

The Court: Now, do you know of any other matter with regard to this particular problem that you didn't bring out either upon direct examination or on cross-examination?

The Witness: Yes, sir. [761]

The Court: Well, what is it?

(Testimony of Lester Cole.)

The Witness: Well, for one thing, there were statements, public statements made by senators of the United States.

The Court: Just a moment. I will sustain the objection and instruct the jury to disregard it. We are not going to go into any acts other than the transactions of your employers upon which you act because, if that were true, we are going to try the question of the correctness of your position before the Committee in the light of outsiders, and that is not the province of this lawsuit, and not at this time—now, I am going to watch each question you are going to ask.

Mr. Katz: To make the job easy, there aren't any more.

* * * *

[762]

The Court: Well, nothing is before the jury.

I will state to the jury that we are setting up a screen on which they will be projected a picture of the hearing at which Mr. Cole testified, the portion relating to Mr. Cole. Now, if you will hand the reel to the clerk for identification, he can prepare a tag for it.

(Reel handed to the clerk.)

The Court: But he cannot do it at this time.

The Clerk: I cannot do it now and then run it through.

The Court: It is a plaintiff's exhibit.

The Clerk: It will be Plaintiff's Exhibit 15.

The Court: All right, the reel will be marked Plaintiff's Exhibit 15. [763]

(Testimony of Lester Cole.)

Now, I have done the identifying, Mr. Katz. Now, you make your offer.

Mr. Katz: Yes, preliminarily, there are places in this reel which are sort of a blank. That means the picture of the witness was not being taken at that time and it was blanked out. The reel is limited to Mr. Cole's appearance before the committee, the physical situation in the hearing room at the time he was asked the questions and responded in the manner indicated, at the hearing in Washington, D. C.

The Court: All right.

Mr. Katz: Now, there are blank spaces. That simply means that the camera was not being focused on him at that particular moment by the cameraman.

* * * *

[764]

Mr. Katz: Perhaps this would make it easier: In the light of your Honor's ruling, the record contains, before Mr. Cole, a statement of Mr. McNutt, the attorney for the [765] Producers' Association and it would probably be easier if they went in sequence, that being offered by us as part of what the employers did before Mr. Cole, and so exhibit would be a composite one and it would be easier, that is, we would offer both Mr. McNutt's statement about the hearing before Mr. Cole testified and Mr. Cole's testimony and then we would not have to block off this record, and we so offer the exhibit at this time.

The Court: All right. Is there any objection to receiving them in that order?

Mr. Katz: And then we could go right straight

(Testimony of Lester Cole.)

through. Let us get it started and go right straight through.

Mr. Selvin: All right. Now, we have no objection to the section relating to Mr. McNutt being shown. I would like a stipulation that the statement which Mr. McNutt is shown as making was made before any of the 10 men had testified, that it was made or posed, if you want to put it that way, for newsreel purposes and that portions of it, I don't know exactly which portions, were actually incorporated in a Fox Movietone reel which was distributed throughout the nation.

Mr. Katz: We so stipulate. We so stipulate.

Mr. Selvin: And that this statement he is making is not a statement that he made before the committee, but is simply a statement he made publicly.

Mr. Katz: A statement that he made publicly for the [766] newsreel purpose.

* * * *

[767]

(Whereupon there was projected on the screen the figure of Mr. Paul V. McNutt, who gave the following statement during such projection:)

"There is only one way to tell whether there is subversive propaganda on the screen. The pictures themselves are the proof. We have asked the Committee to give us the names of suspect pictures. The Committee has refused. Why? No evidence has been produced at these hearings that the pictures contain any subversive propaganda, and the truth is, there is no un-American propaganda on our screen; there never will be, and we will never use

(Testimony of Lester Cole.)

the right of free speech as a cloak to do any such thing.

“We rely on the American people themselves to judge the pictures and we will fight to continue a free screen in America. We fought for it when freedom of speech was challenged before a Senate committee in 1941. The industry asserted, then, its right to choose the material to be used on the screen. It emphatically reasserts that right today and accepts full responsibility of screen conduct.

“We will never abandon our fight to maintain a free screen in America.”

(Whereupon a recording was repeated of Mr. Lester Cole's testimony which he gave before the Committee on Un-American Activities of the House of Representatives, 80th [768] Congress, First Session, and a moving picture of the hearing during such testimony was projected onto the screen before the court and jury.)

The Court: All right.

Mr. Selvin: Lights.

Mr. Katz: The plaintiff rests.

The Court: Let the record show that there was projected on the screen the figure of Mr. Paul McNutt who gave a statement which has already been referred to in the evidence and there was also projected on the screen before the jury the conversation which occurred from the moment Mr. Cole was sworn in until he was excused from the stand, and photographic scenes of him in action while he is answering some of these questions propounded to him, and that

(Testimony of Lester Cole.)

they were projected from the reel which has been marked as plaintiff's Exhibit 15 and offered by the plaintiff as a part of his case. All right.

Mr. Katz: The plaintiff rests.

The Clerk: Is plaintiff's Exhibit 15 admitted, your Honor?

The Court: The reel which has been identified only will be received as plaintiff's Exhibit 15. All right.

[Plaintiff's Exhibit 15 consists of a sound motion picture reel depicting and recording a statement of Paul McNutt; and the appearance and testimony of Lester Cole before the House Committee on Un-American Activities.]

* * * *

[769]

The Court: You will be ready to proceed. All right. So we are about to take an adjournment until 10:00 o'clock tomorrow. First of all I want to explain to you that the session so far as you are concerned has been rather brief this afternoon and this was brought on by the fact that such matters required discussion between court and counsel, and in our conference we determined the course of conduct in the case as to certain matters, so that your time will not be taken by listening to arguments which do not interest you at all, because you are not interested in the divergence of views of counsel about the law. You will get the law in the form of instructions to be given to you at the conclusion of the case. So I desire to assure you that the time was profitably spent and time was gained thereby. [771]

Now, I repeat the admonition not to converse

among yourselves nor with anyone else on any subject connected with the trial nor to form or express an opinion thereon until the cause is finally submitted to you.

You may hear, through the witnesses and through documentary evidence which may be presented by the defendant, facts which may change or affect the complexion which the testimony you have so far heard has placed upon the matters with which you are concerned in this case. There may also be testimony which may contradict the version of conversations or occurrences as given by the witnesses for the plaintiff. It will be up to you to resolve the conflict.

It will be up to the court to instruct you in the instructions as to the criteria to be used in determining a conflict between the testimony of witnesses. Until you have heard those instructions, you are not in position to form an opinion as to the particular fact as to which there may be contradiction.

There are many principles of law to be covered by instructions which are in the process of being embodied in instructions that I am to give to you.

I, myself, have not yet decided as to the ultimate form and under our procedure, before the arguments will be presented to you, we will again excuse you while counsel and I discuss my action upon suggestions for instructions that they [772] have made, it being the requirement of the law that I inform them in advance what I did with their suggestions, so they will be freer to argue to the jury according to the theory that they have propounded if I have

accepted that theory. They will cover a great variety of topics.

In fact, it is my intention in this case, because all my instructions are always in writing, and because jurors are permitted in our courts to have the instructions if they so desire, to divide the instructions into various parts as nearly as possible, grouping all of them together, and delivering them together with an indication of possibly a headline characterizing them, so that if you look at them, if you hear them when you hear them and if you look at them, you will see that each group relates to a particular topic. I am doing this in this case, as I do it in many cases of a different character, where the range of instructions covers several fields of inquiry and the instructions in this case will necessarily follow, cover several fields of inquiry. The reason I am telling you that is not to give you a preview of what the instructions are going to be, but to emphasize the importance of your keeping an open mind until all the facts are in, until you have heard the instructions on the law, before you make up your opinion as to any of the facts which you will be required to find in the interrogatories which the court will submit to you. [773]

And as you have already been informed, in this case, because of its nature, your task will be a little more difficult than that of the average juror, in the average case, because this is what we call a declaratory judgment case. You are not going to have submitted to you, as is done in an ordinary case, a form of verdict, one for the plaintiff and one for the defendant in which you are asked to either decide one

way or the other and if damages are awarded, to put the amount of damages in. [774]

You are not going to be asked any such questions because damages are not involved in this case. You are going to be asked two or three questions, each of which will call for an answer, a unanimous answer, in the affirmative or in the negative, each of which will have to be studied separately. So that your task will be more difficult than that in the ordinary case where you just make up your minds as to whom is going to win. You don't do that in this particular case, as you will find out when you answer the particular questions. All of the questions will relate, of course, to the one question you are going to determine, and that is the only question that is before you, whether the conduct of the plaintiff before the Committee had the effect that the defendant claims it did in its notice of suspension.

Keep your minds open and do not form an opinion as to any of the matters that have been brought before you until the cause is finally submitted to you.

* * * *

[775]

Mr. Selvin: We have informed counsel for the plaintiff, your Honor, that shortly in the course of presenting the defendant's case, that we propose to offer some 60 or more depositions of various persons throughout the country. Plaintiff's counsel have requested that they have an opportunity, outside of the presence of the jury, to interpose their direct objections which they have to all or at least parts of all of those depositions.

I am somewhat at a loss as to what is the best method of offering the depositions expeditiously. I

might make this supplemental statement: These depositions were taken pursuant to a stipulation in another action, with a stipulation that they might be used in this action with the same force and effect and to the same extent as though expressly taken in this action.

They were taken upon written interrogatories.

We have here at the moment one of those depositions, which for our purposes at least could serve as a typical exemplar of at least a number of those we propose to offer.

Mr. Margolis: Which one is it?

Mr. Selvin: And it may be, by going through that particular deposition, that we can receive a ruling of sufficient universality so that both sides, then, will be able to determine to what extent the remainder of the depositions will be usable if at all.

Mr. Margolis: I might say, your Honor, that we agree that the selection of one or two depositions might be a good manner of sort of having a trial run on these things, but I can't find the one counsel is referring to.

* * * *

[780]

Mr. Selvin: I now offer, as the first of the depositions taken pursuant to the stipulation, the interrogatories which have just been marked and answers of David H. Caplow.

The Clerk: The interrogatories are marked Defendant's Exhibit D and the deposition of David H. Caplow is marked [787] Defendant's Exhibit E, both for identification.

The Court: All right. Let's hear what you have to say.

Mr. Margolis: If your Honor please, we object to the entire line of questioning as set forth in the direct interrogatories on the ground that it is incompetent, irrelevant and immaterial and particularly on the ground that the method selected for attempting to prove a violation of the morals clause is not a proper method. * * * [788]

The Court: No; not necessarily. What I said about the editorials doesn't apply to but one phase of the case and that is injury to the defendant and the business. The morality clause or public relations clause provides that conduct is forbidden which injures—it says “or prejudices the producer or the motion picture theatrical or radio industry in general.” That clause is like a special damage clause. As I stated to you in chambers yesterday or during the course of the discussions, it is no longer the law that a corporation may not be injured in its reputation. The old law used to be that you couldn't hurt a corporation unless you did something which affected its income. The present law is that a corporation has a reputation and you can injure its reputation by making a derogatory statement about the manner of its doing business. For instance, if you state of a bank that they are conducting their banking business according to the standards of a pawnbroker, that would reflect upon the business of the bank. Not that a pawnbroker isn't a legal, legitimate business, but it is considered lower than a bank and the banks are supposed to have higher standards of dealing with persons and not indulge in the practices and the type of overcharges which are commonly attached to the pawnbrokerage business, where their

conduct [789] is not regulated by statute. So that is the fact. Whether that was the injury or not can be proved in two ways. You can argue to the jury that the conduct was of a character that would have that effect. I am making this statement for the record because some of this was discussed yesterday in chambers and didn't get into the record at all. I think I ought to make that statement now so you will understand what is in my mind before I rule.

So that as to the effect on the community, as to the libelous effect, shall we call it, as to being shocking on the community, I am still of the view at the present time that the editorials have no bearing on the matter, although I may say this, that if this is opened up through the offer of the defendant, I may change my mind and you may change your mind as you indicated there, because if we open it up, we might as well let everything in.

In other words, if the defendant chooses as a way of defending the case, which they have a right to, of showing actual injury, then the whole case is opened up, including your offer. Remember, I warned counsel of that. You offer to prove that in fact they weren't injured and bring in not only this company but all the other companies, to show what their profits were in general and also on the pictures here, but I am merely referring to some of the responsibilities that we have discussed privately. Of course, it is up to the defendant, if they choose to base their defense upon actual injury, it is up to them to do so. I merely repeat what I have said before, that if they do, in other words, that if I sustain their position in this case, then I will allow you, as I said two

weeks ago, to counteract it by showing that regardless of what the American Legion posts did—and I am a member of the American Legion post, in fact I am proud of having been a member of the Post No. 8 for over 30 years, and I have a certificate [791] certifying to the fact, so I am making that statement so there will be no misunderstanding that by what I am saying I am criticizing the type of organizations that they have chosen, the American Legion or the Veterans of Foreign Wars or the Daughters of the American Revolution, I don't know what societies they have chosen, but if they do that to show prejudice, then they will be permitted, and I state that as emphatically as I said it in chambers, to show that as a rule, as a matter of fact, regardless of what these people did, they weren't actually hurt because these very pictures by these very people continued to be exhibited and they didn't junk them, they did not put them in the morgue, but they exhibited them and they actually made money.

Now, upon that issue, I take this to be a part of their testimony bearing upon actual injury, not the mere effect as to which I said proof could not be given, but actual injury.

Therefore, a corporation, for instance, in libel, in an action for libel a corporation could do one of two things. They could rely upon the effect of the article itself. They could also show and plead special damage, you see. Now in this case they did not have to plead special damage. They can show it and I gather that the object of this testimony is to show not only that it was of a character that prejudiced them, but that various organizations, such as, for

instance, the act of the Cook County Counsel of the Veterans of the [792] World War of the United States, which I assume was in Illinois because that is the county in which Chicago is located—what was the beginning of my thought?

(Record read by reporter as follows:)

(“They could also show and plead special damage. Now in this case they did not have to plead special damage. They can show it and I gather that the object of this testimony is to show—”)

The Court: —to show prejudice resulting from positive action on the part of various patriotic organizations relating to the pictures to be produced, pictures with the making of which these ten men were connected.

So if for that limited purpose these are admitted, of course, as I told you before, it will enable you to show that other organizations actually didn't and also to show that whether they did or not, the box office remained the same, so you can argue to the jury that regardless of what somebody said or didn't say, ultimately the proof of the pudding is in the eating, and when you claimed in chambers when we were discussing the subpoenas not only directed to this defendant but to other members of the motion picture industry, they can show that there was no diminution of the intake from the pictures made by Mr. Cole—let us limit it to him, that you will be allowed to show that, so that you will be able to argue to the jury that regardless of what [793] these people said, that the people still went to see the pictures and that they still brought in money.

Mr. Selvin: May I say just a word, your Honor, which perhaps might clarify your Honor's determination of this matter?

The Court: Yes.

Mr. Selvin: These depositions are being and will be offered by us for the identical purpose and only for the purpose for which the editorials were to be offered which we discussed. We do not contend that these depositions prove financial or monetary injury. We do not offer them for the purpose of proving that.

We offer them for the purpose of showing the effect of the conduct to which we have reference upon the various segments of the community and we propose to show that, that being a matter of what you might call a collective state of mind, by discussions and conduct of people whose state of mind is in question.

The Court: Mr. Selvin, in September of next year I will celebrate my fortieth year of admission to the bar. I have had a long career, twenty-one years of which has been on the bench of this community, eight years as judge of the Superior Court and now my fourteenth year as judge of this court. I know juries in this community and elsewhere, and if that testimony is offered for one purpose, the judge doesn't exist who [794] has the Solomonic wisdom and ability to tell the jury that you are to consider it for one purpose or for another. It reminds me of the situation which used to arise in libel cases and which arose in many of the libel cases I tried in this community, such as Snively against the Los Angeles Record, Earle against the Los An-

geles Record and Scott against the Los Angeles Record where, under the defense of diminution of damages, we started to prove the source of our information. We did not plead the truth, because we could not prove the truth, but, before we got through before the jury, there wasn't a person on that jury who could distinguish whether we were offering it for one purpose or another, and we were doing exactly what you are doing, we were doing it in just as good faith as you are doing it, we were offering it for a limited purpose, but you can't disassociate them in the minds of the jury. And if they are of a character that might be considered by the jury, the mere fact that you limit that would not prevent me from allowing them, in anticipation, that the jury might consider them as actually harmful to the industry, to show profit as an element of harm.

Mr. Selvin: May I comment, first, your Honor, that—

The Court: Furthermore, I am not prepared yet—I have not ruled definitely on the editorials and counsel have indicated that they haven't made up their minds as to whether they might not agree to them. [795]

My mind is in a sort of flux, as I told you. I am studying this case all the time and between last night and today I changed my mind about some of the instructions and I am rewriting several. My mind is in a state of constant flux and subject to change at any moment, and I may state, I have not definitely said that I would not allow the editorials to go in.

Mr. Selvin: I understand.

The Court: I may allow them to go in and these

to go in and open the whole thing up, but, if I do, I am going to allow them whether you claim that you are offering them for one purpose or another—no. I will put it this way: I want to be fair with you so that you may not claim that you—of course, when you make an offer, you are charged with any consequences of the offer and if by reason of what you do I take an attitude as to other evidence which you have no right to anticipate, you can't claim that as a defense because I am not going to warn you in advance what I will do if you take a certain step, but in this particular case, we discussed this problem in chambers about two weeks ago in the presence of not only yourselves but in the presence of other representatives of other motion picture industries, and at that time I made the statement that I could not at that present stage say whether profits were material or not, but that if proof is offered on the part of the defendant of actual harm other than the mere effect of the articles themselves, that [796] it may become material and I would require you and the others to furnish that information so that it may be available in case I decide it comes in.

So that I am merely repeating here, for the record—I forget whether we had the reporter in there at that time, I don't think we did, because we were all standing up and I know we would not be standing up if we had a reporter there.

Mr. Selvin: No, we didn't.

The Court: All right. I am merely stating here what I have already told you, that in fairness to the plaintiff in this case, if you offer any evidence which

may be considered by the jury in determining whether prejudice actually resulted, then they can offset it by showing that profits actually did not diminish and then it is for you to argue to the jury as to what effect is to be given to it. I am talking merely about the admissibility of the testimony and I would be inclined to admit it for the reason that I believe that these cannot show public opinion, because even if the editorials are admitted as indicating what goes to create public opinion, what you are trying to show is actual resolutions not to patronize the pictures produced, you are trying to show public boycott through a resolution for a boycott and when you do, when the jury is drawing that kind of an inference, it is open to them to show that in reality your boycott didn't amount to anything because your box office, as you call it, [797] was not affected by these resolutions.

Mr. Selvin: All I said and attempt to say, your Honor, so that the court will not be under any misapprehension as to the purpose for which we offer this testimony and the effect of it which we intended to argue if admitted, is that it was offered for the same purpose and only for the same purpose as the editorials.

If your Honor believes that other conclusions may be drawn from their testimony which cannot be dissipated by either the ordinary or extraordinary type of instruction, then I admit that as a matter of discretion your Honor probably has a right to exclude the evidence, for that reason.

The Court: No, no. I won't take that right. I won't do that. No, no. That would not be reviewable.

That would not give me a good enough record. No. If you offer it for one purpose only, I have a right to admit it for all purposes, you grant that, whether you take advantage of it or not, you see the point, but I am not going to commit myself in advance and exclude them because if I feel that they are admissible for one purpose, I will admit them, and then allow them to overcome by evidence any conclusions that may be made by the jury as to any actual harm. That is all I am saying.

Mr. Selvin: Now, may I suggest an analogy in that regard? That goes back to the discussion which we had yesterday in chambers which is also not on the record. [798]

* * * *

Mr. Selvin: The analogy I refer to, now this goes to the phase of your remarks where you say if it is admitted at [799] all, it presumably will be admitted for all purposes and not the limited purposes which we indicate and as a consequence the door will be open to the plaintiff to dispel what is felt to be the impression which will result from this testimony. In our discussion yesterday I pointed out to the court that there had been testimony in this cause, and I am trying to think whether over our objection or not, but it is immaterial—testimony in this case as to what had occurred at the Waldorf and of the issuance of a statement of policy in its relation not only to Mr. Cole but in its relation to all of the ten men affected by it. I pointed out at that time that in my opinion that the purpose which the plaintiff had in mind in introducing that testimony was to enable

them to argue to the jury, mentioned frequently in the course of the proceedings in the presence of the jury, the fact that there was a blacklist, and that because of the impression conveyed by that testimony in its broad scope, notwithstanding the limited purpose for which it might have been offered, we were entitled to dissipate that impression by going into the entire question of what these ten men had done in relation to its effect in the action represented by the statement of policy, and your Honor has indicated and I assume that you will make the ruling, when the evidence is offered, that we wouldn't be permitted that broad a scope.

The Court: I may change my mind as to that, too. [800]

Mr. Selvin: I trust that your Honor will.

The Court: I am not through.

Mr. Selvin: I trust that your Honor will in that regard.

The Court: I may, but we will see what the scope of the testimony is. In other words, if I do not keep this case within the groove that I laid down for it, namely, that the question of the effect of the conduct is one for the jury as members of the community who are to determine whether the conduct has that effect; just as, for instance, if a man had a broken leg and you sued for general damages, you put evidence on that the man's leg was broken, you put evidence on that in effect it would take so long to heal, but you don't put anybody on the stand to testify that it is worth \$25,000 to have a broken leg. They are told in determining what general damages are that they are

to judge by their own experiences as members of the community, considering certain elements. This is something that I thought of. For instance, last night I thought about it, about 1:00 o'clock this morning, another analogy: so that we are in the same position when we have a person who is suspended because he had broken not the defendant's leg, you see, but a code of morals which isn't specified, which is couched in general terms, shocking to the community.

It is my view that the only question that should go to the jury is whether the conduct was such as to have that result [801] in the minds of persons whose opinion we follow and whose standards of right conduct we adopt, and to enable them to do that we have placed before them the conduct, we have allowed great scope of cross-examination as to the motivation of the conduct, whether it was the act of a single person and the act of others. In my view that and evidence on the part of the defendant going to the same issues are relevant; that, too, on the basis of that showing, on the basis of Mr. Mayer's statement as to the causes that led to the action which is in the record, on the basis of Mr. Mannix' statement, on the basis of such additional testimony as you may offer through Mr. Eric Johnston or any of the other persons whose names you have mentioned as possible witnesses, the jury are going to determine whether this "leg" of the motion picture industry, as I call it, was broken. They are not going to be called upon to say how much damage was done, but they are going to determine whether the conduct of the plaintiff harmed the defendant, not in terms of money but as

shocking the community and the like. This is a new angle that I thought of since last night, and your statement gave me an opportunity to suggest that as another analogy that we haven't discussed.

We have exhausted the law on libel, including my own books on the subject, and I have exhausted all the library law on libel. [802]

Now I have a new one on the law of general damages.

So, to sum it up, I believe that with these facts before the jury, the jury are in position without any aid of commentators or editorial pundits, Walter Lippmans, Walter Winchells, Peglers and Jimmy Fidlers, and the women, Louella Parsons and the others, and my colleagues of the American Legion, to tell them whether as a fact they as a part of the community were shocked. Now, that is the question that I have in mind.

Mr. Selvin: May I confer with Mr. Walker for just a moment and then I will make a final statement?

The Court: Yes. Before you answer, I want to make this final statement. I want to sum up. In fact, I will take a recess while you consult with him. I want to make this final statement and that is this: if you look in the record you will find that from the beginning of this case I have consistently overruled the contention of the plaintiff that this case presented purely a question of law and no question of fact.

I denied the motion for summary judgment when it was made way back in March. I denied it. It was

in March, the day I wrote the opinion—I think it was early in April.

A similar motion for summary judgment was made and the motion for summary judgment was based on the proposition that I as a judge should determine, as I would in a libel case, [803] whether this conduct had that effect, and they wanted me to so determine.

If I agreed that that is only a question of law and decided the question either yes or no, there would be nothing to present to the jury, because if I held that the conduct had that effect, there was no lawsuit left.

If I held that the conduct didn't have that effect, there was no lawsuit left so far as you are concerned—rather I should say there was no lawsuit left so far as the plaintiff is concerned.

If I held it didn't have such effect, there was no lawsuit so far as you are concerned and they were entitled to a declaration in their favor.

But I have come to the conclusion—I have been reinforced in the conclusion that my contention is correct to such an extent that I informed you yesterday in chambers and stated to the jury generally that I will submit to the jury in the form of two or three questions, which are really a modification, condensation of five that you have submitted, the question whether the conduct subjected the plaintiff to ridicule and obloquy—the words from the definition of libel seem to come into my mind, whatever the phrase is—whether they shock the community or whether they prejudice. Now, you may assume, now, that as

to that point I will not change my mind and am telling you so. [804]

So that at the present time I agree with you, with your contention throughout that it is a question of fact for the jury to determine. I am not saying what effect I am going to give to the finding of the jury one way or the other. That is a problem that we will not reach until the jury's verdict is in, until the matter has been brought before me for making the final judgment, I being the only one who can make it. I am not doing that, but I am saying merely that I agree with you that so far as the jury is concerned, this presents a question of fact.

Whether later on the finding of the jury affects me in the type of declaratory judgment is an entirely different question which we can't reach until that eventuality has come to pass and you and other counsel have had an opportunity to argue what effect the answer of the jury to the questions should be given in the declaration to be made by the court.

Now, if you want to recess, I will give you and myself a recess while you discuss the matter and we will come back.

Mr. Selvin: I have discussed it with Mr. Walker and before we take the recess I will make this statement and I will make it short, because I don't want to say anything that might prompt your Honor to change his mind on the subject on which you have just said you would not change your mind, but in view of the discussions we have had an expressing [805] apology for having taken up the time of the

court, we will withdraw the offer which has been under discussion.

The Court: All right. I talked you into it.

Mr. Selvin: You talked me out of it. [806]

* * * *

The Court: Let the record show the jury is in the box. Proceed.

Mr. Selvin: At this time, may it please the court, we should like to offer in evidence a motion picture showing, substantially in the same form as did the picture of Mr. Cole shown yesterday, the testimony and conduct before the Un-American Activities Committee of all of the 10 men who have heretofore been referred to in evidence. I understand that it is agreed that the proposed motion picture correctly reflects the proceeding but that substantive objections otherwise are reserved.

Mr. Katz: To which, on behalf of the plaintiff Lester Cole, we interpose the objection on the ground that it is immaterial. This is an action involving Mr. Lester Cole's contract with his employer and in the notice of suspension it is Mr. Cole's acts and conduct for which his contract is sought to be suspended. We object to that on that ground, in the light of the contract itself, the notice of suspension that was sent, and the fact of the statement of Mr. Cole, and the picture of Mr. Cole before that committee has already been exhibited. There is no materiality at this time, at least at this stage of the proceedings, what nine or 10 or any number of other persons may or may not have said or done before the committee.

Mr. Selvin: We have heretofore indicated to your

Honor [807] our views upon that subject and I don't believe it is proper for me to comment at this time beyond saying I think your Honor is familiar with our position.

The Court: I will do this. I will at the present time sustain the objection. Or, to put it the other way, I will sustain the objection to the presentation of the motion picture at the present time. I will state for the record, as I understand it, the theory upon which you present it is that, because certain action relating to all employees in the same category preceded the action of the defendant with relation to this particular contract, you feel that these are admissible as showing all of the facts which the committee may have had before it. It may well be that the turn that your testimony may take, through testimony of witnesses to be given, might warrant later on the repetition of the offer but I am satisfied that at the present time the acts of the other 10 or of the other nine, rather, should not be shown to the jury because they are not material to the controversy. But, if I should allow some additional facts to be brought in, which are not before the court, as going to the entire background, I want to reserve to you the right to repeat the offer after such additional facts have been presented.

Mr. Selvin: Thank you, your Honor. I may say that it was our intention to request leave to renew the offer after certain other evidence had come in.

* * * *

[808]

MAURICE BENJAMIN,

a witness for the defendant, being first duly sworn,
testified as follows:

The Clerk: What is your name, please?

A. Maurice Benjamin.

Direct Examination

By Mr. Selvin:

Q. Where do you live, Mr. Benjamin?

A. 433 South Ogden Drive, Los Angeles.

Q. What is your business or occupation?

A. Lawyer.

Q. With what firm are you connected?

A. Loeb & Loeb.

Q. Is that the firm which represents generally
in this area Loew's Incorporated, the defendant in
this action?

A. That is correct.

Q. You have heard reference in the courtroom
here, have you not, to certain hearings that took place,
between October 20th and 30th, before the House Un-
American Activities Committee?

A. I have.

Q. Were you present at those hearings?

A. I was. [817]

Q. At what portion of those hearings were you
present?

A. I was present throughout the hearings.

Q. October 20th to and including October 30th?

A. That is correct.

Q. In what capacity were you present at those
hearings?

A. I was there as a representative of Loew's In-
corporated and as one of the representatives of the
Motion Picture Association.

(Testimony of Maurice Benjamin.)

Q. As a representative, do you mean an executive representative or a legal representative?

A. As a legal representative.

Q. Were you at any time involved, at, during, before or after, those hearings, employed or authorized by Loew's, Incorporated, to give any form of directions, instructions or suggestions to any of its employees? A. I was not.

Mr. Katz: Just a moment. To which we object upon the ground it is immaterial.

The Court: What is the question?

(Question read by the reporter.)

The Court: Overruled. It is, generally, to give the scope of his authority.

A. I was not so authorized.

Q. (By Mr. Selvin): I take it, in view of your testimony, [81S] that you were actually present during the time that Mr. Cole appeared before the Committee? A. I was.

Q. You have heard the testimony here with respect to nine other men who have been referred to as the ten men who appeared before the Committee? A. I have.

Q. Were you present during the time that all of those men testified? A. I was.

Q. I take it, then, that you saw and observed what they did and heard what they said?

A. I did.

Mr. Katz: Wait a minute. I object to that on the ground it is immaterial.

(Testimony of Maurice Benjamin.)

The Court: Go ahead. I think that is a permissible short-cut. Go ahead.

A. I did; yes.

Q. (By Mr. Selvin): After the hearings had been concluded, did you discuss with any executive or officer of Loew's, Incorporated, the matters that you had seen or observed at these hearings?

A. I believe I did; yes.

Q. With whom?

Mr. Katz: To which we object on the ground it is immaterial. [819]

The Court: Overruled.

A. Mr. J. Robert Rubin, vice president and general counsel of Loew's, Incorporated, and I believe also, separately, with Mr. Nicholas Schenck, president of Loew's, Incorporated.

Q. About when did those discussions take place?

A. About the 3rd or 4th of November, 1947.

Q. And to which one of them did you talk first, as you recall?

A. Probably to Mr. Rubin.

Q. Was anyone else present at the time besides the two of you? A. I believe not.

Q. What did you tell Mr. Rubin with respect to what you had seen and observed at the hearing with respect to these ten men?

Mr. Katz: To which we object on the ground it is incompetent and immaterial, hearsay, and outside of the presence of the plaintiff. A report by Mr. Benjamin to someone else in the organization, for which he says he was an attorney, is certainly not in any way material in this case.

(Testimony of Maurice Benjamin.)

Mr. Selvin: I can't see, your Honor, how it differs from the report which Mr. Kenny made to his people with respect to the Shoreham conference, in the first place, and, in [820] the second place, it is offered solely at this time for the purpose of showing the information which the responsible heads of Loew's acquired and with respect to which they took the action which is in controversy here.

Mr. Katz: I don't think any preliminary investigations or discussions prior to the meeting at which this action was taken are material.

Mr. Selvin: I intend to connect it up by showing that the men to whom he talked were present at the meeting in question.

The Court: If you merely want to ask him to identify the persons so as to show who the persons were at the meeting, I will allow you to do that, but not as to what information he secured in advance or what discussions they had. [821]

Mr. Selvin: My purpose is to show the information which the representatives of Loew's were armed with when they attended the meeting, along with information, which I intend to show also by another witness, which was information which they had when they took the action represented by the statement of policy.

The Court: If you want to show what information they were armed with, you will have to show it by them, assuming it is material at all, not by the report of Mr. Benjamin. He can testify as to what he did or said at the meeting but he can't testify as to what information he conveyed to others.

(Testimony of Maurice Benjamin.)

Mr. Selvin: I am asking him to tell what he told the others. That is evidence of the information that the others had.

The Court: Oh, no. He may tell a lot of things which came to him by hearsay. He may testify to what he knew, not what he communicated to others. There is no similarity of this and the testimony of Mr. Kenny. That was merely offered for the purpose of showing that certain information that came to him was communicated to this particular plaintiff.

Mr. Selvin: That is precisely what we are trying to do here, to show that certain information which came to Mr. Benjamin was communicated to the defendant Loew's, Incorporated, through its president and vice-president.

The Court: As they are available and they are living [822] persons, I will sustain the objection at the present time because it is hearsay. They can testify themselves as Mr. Mayer testified to what information he had. I am not going to allow the statements of an attorney, as to what information he gave to them, to go in lieu of the testimony of the person. I think the jury have the right to see the witness himself and to have him testify as to what information he had. Then, if it is disputed, you can bring Mr. Benjamin back and have him testify that he actually gave them that information. You may identify the persons. [823]

* * * *

Q. (By Mr. Selvin): I think you have iden-

(Testimony of Maurice Benjamin.)

tified Mr. Rubin. Who is Mr. Nicholas Schenck to whom you referred?

A. He is the president of Loew's, Incorporated.

Q. Without indicating the substance or details of your discussion, can you answer yes or no as to this: Did you discuss with Mr. Rubin and Mr. Schenck the action, if any, which they should take, on behalf of the company, with respect to the situation brought about by the Washington hearings?

A. Yes, sir.

The Court: Do you want to object to that?

Mr. Katz: No, sir.

The Court: I was going to overrule it if you were. All right. Go ahead.

Q. (By Mr. Selvin): You have heard, I take it, references here in the testimony to a meeting at the Waldorf-Astoria on the 24th and 25th of November, 1947? A. I have; yes.

Q. Were you present at that meeting?

A. I was.

Q. And in what capacity?

A. In the same capacity, as one of the attorneys representing Loew's, Incorporated, and the Association that I have referred to. [824]

Q. In your prior discussions with Mr. Rubin and Mr. Schenck, and, again now, without going into the details of what you may have said but merely stating yes or no, did you discuss with Mr. Rubin and Mr. Schenck or did you report to them what you had seen and observed with respect to the conduct and testimony of these 10 men at Washington?

(Testimony of Maurice Benjamin.)

A. I did; yes.

Mr. Katz: Just a moment. We object to that question upon the ground that it is immaterial. They can't do by indirection what can't be done directly. And, insofar as it has reference to anyone but Mr. Cole, it is completely immaterial. [825]

The Court: Well, I think that the limited scope of your questions, that is, that information was communicated is permitted. I am not going to allow him to testify as to what he told them, because if you want to show the information they acted upon, they must come here and testify as to whether they acted on that or not. If they do not, then, this is not—if they do come and testify and testify to the information, to certain information, Mr. Benjamin could come back and corroborate them by saying that he gave them that information, because ultimately the object, as the District Court of Appeals of California said in the May case, then the ground alleged in a notice of termination of a contract must, so far as the employer is concerned, be true. Now, they are trying to show that it is true, just as you tried to show that it wasn't true by showing that they had taken certain attitudes and changed their minds all of a sudden, and so on and so forth. I don't want to summarize the testimony. So they may, whether you attack it or not, show that this was the true ground.

Of course, it still remains a question of fact whether the ground was available to them. This merely goes to show that the action they took was

(Testimony of Maurice Benjamin.)

based upon the conduct before the Committee. Whether that was of the type which was covered by the notice, that is the question that is to be determined by the jury at the proper time. [826]

The objection is overruled. Now, go back to the question.

(Question and answer read by the reporter.)

The Court: Go ahead.

Q. (By Mr. Selvin): Have you since those hearings at any time seen a motion picture purporting to show the testimony and conduct of these ten men at these Washington hearings?

A. I have, yes, sir.

Mr. Katz: To which we object. Just a minute. To which we object upon the ground that whether he has seen the motion picture or not is immaterial. He was asked the question whether he had ever seen a motion picture of it.

The Court: Well, this is preliminary, because he is going to follow it with the question of whether that was brought to the attention of the executive, Mr. Schenck, or whoever he refers to.

You may answer.

Mr. Selvin: I think he had answered already before the objection was made.

The Court: Yes. All right. Then the answer may remain.

Q. (By Mr. Selvin): And did that picture which you saw, or did it not, correctly and completely reflect what you saw there depicted with

(Testimony of Maurice Benjamin.)

respect to the conduct of the ten men, at [827] the hearings? A. It did.

Mr. Katz: We object on the ground that it is incompetent, irrelevant and immaterial and calls for a conclusion of the witness. It requests him to put in evidence by an attempt to do indirectly that which could not be done directly.

The Court: All right. What is the question?

(Pending question read.)

The Court: Objection overruled. Overruled.

Q. (By Mr. Selvin, continuing): At the Washington hearings?

The Court: All right, objection overruled.

A. It did, yes.

Q. (By Mr. Selvin): Did you report at the time that you have indicated to Mr. Rubin and Mr. Schenck what you saw and observed?

A. Yes, I did.

Mr. Katz: That is already asked and answered.

The Court: That is all right.

A. I did, yes.

The Court: That is all right. You may answer. Objection overruled.

Mr. Selvin: Now, we will at this time renew our offer with respect to that film.

The Court: It will be rejected. I know what you are [828] trying to do. You will have to prove it. You will have to bring Mr. Schenck here and prove that he actually saw the picture and what he acted on. [829]

(Testimony of Maurice Benjamin.)

Mr. Selvin: There is no question of whether Mr. Schenck ever saw the picture.

The Court: Then it is immaterial, because it doesn't show on what they acted.

Mr. Selvin: Well, if your Honor please, if Mr. Benjamin, as a representative of Loew's or not reported to the executives of this corporation what happened there, that was information which they had and which reflected whatever influence it might have exercised upon them in arriving at their actions.

The Court: After you produce Mr. Schenck and the others and they will testify that they acted upon his report of the picture, I will let you renew the offer to either have him read what he saw, or the picture, but not until they have first said that this particular piece of evidence influenced them in making the decision will you be allowed to show the pictures.

Mr. Walker: May I speak to counsel for just a moment?

The Court: Yes.

Mr. Selvin: Mr. Walker calls my attention to the fact that it has already been testified in this case by Mr. Mayer, in answer to questions asked by Mr. Margolis, that the action with respect to Mr. Cole was taken pursuant to the policy adopted at the Waldorf-Astoria. Now, we seek to show the information which was before the representatives of this company, who participated and acquiesced in the policy adopted at the Waldorf-Astoria and who,

(Testimony of Maurice Benjamin.)

according to Mr. Mayer's testimony, acted upon it.

The Court: Well, Mr. Mayer's testimony as to what he acted upon. Before I can allow it to be introduced as to others, I want them in the courtroom to tell the jury that they actually acted upon this, on this picture of what they saw, upon which Mr. Benjamin acted.

Mr. Selvin: Your Honor misunderstands me there.

The Court: Perhaps I did.

Mr. Selvin: I don't want any misapprehension. There is no contention that Mr. Schenck or Mr. Rubin or anybody else connected with Loew's, Incorporated, ever saw this picture before a few days ago.

This picture to which I have reference was offered for the purpose of presenting visually or optically I think Mr. Kenny said, a correct representation of what actually occurred there at Washington. It is our contention that Mr. Rubin, Mr. Schenck and Mr. Mayer were fully informed as to what occurred at Washington.

The Court: Then, let Mr. Schenck and Mr. Rubin come here and let them testify, first, that they were fully informed. Then, if they can't give us the details of their contention, then we will allow you to bring Mr. Benjamin back on the stand.

Mr. Selvin: In view of your Honor's references to bringing Mr. Schenck and Mr. Rubin here, I wish to state that they are residents and are presently, as far as I know, in New York. If it is pos-

(Testimony of Maurice Benjamin.)

sible to bring them here, within the limited time, we will be glad to do so.

The Court: The process of this court is available to you to bring anybody to this court from all over the United States.

Mr. Selvin: In a civil case, your Honor? As I understand, the process is specifically confined to criminal cases.

The Court: And furthermore, they are your clients. You are supposed to anticipate. But this is not secondary evidence.

Mr. Selvin: No. I think it is primary evidence.

The Court: It is primary evidence and being that they are witnesses on your part, you had means at all times of having them come, by asking them, if they are interested in the lawsuit, and I merely made the statement—I did not know whether they live here or in New York or Timbuctoo, for that matter. I merely made the statement that I want them—that I will not allow this testimony until I am informed, first, or this jury is informed first that they actually acted upon this information, because if he did not act upon it, if we don't have his statement that he acted [832] upon this particular information, then it becomes immaterial.

Mr. Mayer was allowed to testify even while he was on cross-examination as to what he saw and what he heard and what he acted upon. I believe that that rule applies to every other person who was in the same position.

I think I am incorrect about the process. I

(Testimony of Maurice Benjamin.)

think the process in civil cases is merely coextensive with the state.

Mr. Selvin: It is coextensive with the state in which the district is located.

The Court: That is correct.

Mr. Selvin: Within a hundred miles limit, I think.

The Court: That is right. However, that applies to witnesses who have no interest in a case and do not want to come, but witnesses who are interested in a case can be brought by the party itself when they know or expect that they might be needed.

Mr. Selvin: I understand.

The Court: Or their depositions may be taken. I am not condemning you. I misspoke myself with regard to the scope. In the past, as a matter of fact, we could not issue a subpoena outside of the district.

The Congress would have the right to extend our subpoenas to the entire country, if they wanted to, but they haven't given us that power. [833]

Well, the point is this, it isn't a question of inability. If counsel will waive the objection and will stipulate that because of their absence Mr. Benjamin may testify as to what he told them, and that you later will show that they acted upon the information, all right; then I will strike it if you don't show that they acted upon the information.

Mr. Selvin: I think it has already been shown.

Mr. Kenny: We cannot stipulate. We would

(Testimony of Maurice Benjamin.)

like very much if the gentlemen did stipulate to the right to cross-examine.

The Court: Well, I think, gentlemen, in view of that situation and without any intimation on my part—no. Strike that out. I don't want the jury to take any of the discussion we have had as any intimation that counsel has been dilatory or negligent in not preparing themselves, and not having the witnesses here. I am merely saying that in my view of the law, this testimony cannot be brought in until further testimony as to what the particular persons acted on.

If Mr. Mayer's testimony is adequate, then you may choose to rely upon that. But, if you are going to show that others acted similarly, then, that testimony, the primary testimony is their testimony to that effect and this would be merely corroborative after that. [835]

* * * *

Mr. Selvin: Mr. Rubin is a man in ill health and could not fly. Mr. Schenck is also an ill man and could not fly.

The Court: All right.

Mr. Selvin: So that if they are able to get here at all, before we conclude, I will have one or the other of them here.

The Court: I will say this, if you get as far as their testimony by the end of the week, we will continue the matter and if you think you need them and if you want them, you can start them on their way right now and they can be here, even by

(Testimony of Maurice Benjamin.)

train, by Monday. And I will make you the promise, we will put in all the other testimony and wait for them until Monday and they can get here by train, if they want to.

Mr. Selvin: I assure your Honor that the first moment we can get to a long distance telephone the effort will be made so that they will be on their way.

The Court: That is all right. I don't want to penalize you because you may have thought that you might be able to get the testimony by this witness. If any difficulty arises by reason of my ruling, despite the fact I try to economize in time, I am always willing to make allowance so that counsel can comply with the conditions that are laid down before further testimony may be had on a particular topic. [837]

* * * *

Q. (By Mr. Selvin): You have heard reference, I take it, Mr. Benjamin, in the testimony here to a meeting which took place on the 19th of October, 1947, at the Shoreham Hotel, at which it has been testified you were present?

A. I have; yes.

Q. Did such meeting take place?

A. It did.

Q. On that date? A. That night.

Q. And who were present at that meeting?

A. As far as I can recall, Governor Paul McNutt, Mr. Eric Johnston, myself, Mr. Robert B. Kenny, Mr. Charles Katz, Mr. Ben Margolis, Mr.

(Testimony of Maurice Benjamin.)

Bartley Crum, Mr. Martin Popper, and one other gentleman whose name I don't recall.

Q. How did you come to be present at that meeting?

A. I was in Washington at that time to attend the [841] scheduled hearings before the Un-American Activities Committee, as one of the representatives, one of the legal representatives, of Loew's, Incorporated, and, also, of the Motion Picture Association of America.

Q. Were you requested to attend that particular meeting by anyone?

A. Do I understand your question correctly—I wish you would restate it.

Q. I am talking about the Shoreham meeting.

A. Yes. The meeting, as I recall it, had been requested, by telephone, by, I believe, Mr. Crum. It was reported to Mr. Johnston and myself and others that Mr. Crum had telephoned Mr. McNutt and had requested a meeting with Mr. Johnston and himself.

Q. What took place at this meeting?

A. The meeting was held at the apartment of Governor McNutt at the Shoreham Hotel, in the evening. Mr. Johnston, Mr. McNutt and myself were there. These other gentlemen I have referred to then arrived at the apartment. We sat down with them. Either Mr. Katz or Mr. Kenny, I am not sure which at the moment, which one, who led off the conversation, stated to us that they were making a motion or had filed a motion with the House

(Testimony of Maurice Benjamin.)

Committee on Un-American Activities seeking to quash the subpoenas that had been served by the Committee on the various witnesses they represented; and [842] they stated to us that they were making that motion on the ground that, in their judgment, the Committee was proceeding illegally; that it was an invalid committee; that it had no power to investigate except in an area in which it had a right to legislate, and that it was their belief that the Committee had no right to investigate or legislate with respect to free speech, and they felt that free speech as involved in this inquiry. They stated that they had prepared a memorandum of law in support of that position and, as I recall it, they handed me a copy of that memorandum. I believe they also handed a copy of it, although I am not sure, to Governor McNutt. They stated to us that the purpose in meeting with us was to request and obtain our support for their attack upon the Committee's investigation; that they hoped we would join with them in support of them in that position. In response to that statement, Mr. Eric Johnston called their attention to the fact that, prior to this meeting, as a matter of fact, some days previously, he had addressed a letter to the chairman of the House Un-American Activities Committee; that he had addressed that letter as the president of the Motion Picture Association of America and of the Association of Motion Picture Producers. That letter was sent to the chairman of the Committee for the purpose of stating the

(Testimony of Maurice Benjamin.)

position of the industry, or of that part of the industry that he represented, with relation [843] to the scheduled hearings; that in that letter he had stated to the chairman of the Committee, and I might say this letter had been given publicity—it had been publicized in the press—he had stated that we, meaning the motion picture industry insofar as the two associations included the various companies in its membership, welcomed the investigation that the Committee was about to undertake, assured the Committee of our desire to cooperate with the Committee, referred to the fact that charges had been made that there were Communists in Hollywood, stated with respect to that charge that, undoubtedly, there were but that we, meaning the industry itself, neither shielded nor defended them; that we wanted them exposed and that we would cooperate with the Committee. It further referred to the charges that had been made that motion pictures contained un-American or subversive propaganda and that we were prepared to challenge that charge and to fight it and that we asked for a fair hearing. Mr. Johnston stated to the assemblage at the meeting at the Shoreham Hotel that, in view of that expressed position, it was, obviously, impossible for us or the industry to join with or to support them in any attack upon the validity of the Committee's investigation. And some considerable disappointment was then expressed by the other gentlemen present who had

(Testimony of Maurice Benjamin.)

hoped they would receive the support of the industry in their attack. [844]

Mr. Katz: We move to strike that statement out, if your Honor please,—

The Court: That may be stricken. You may state what was said.

A. I think about that time some of the gentlemen present threw up their hands and said that there was nothing further that they could do. During the course of this meeting, which didn't last too long—I don't suppose it lasted for more than 30 or 40 minutes—there was some discussion of the legal position that had been taken by these gentlemen representing these men that had been subpoenaed, as expressed in this memorandum of law that I have referred to. We had some discussion with respect to the legal position that they had taken. I recall, as a matter of fact, my own disagreement in some respects with that position.

Q. (By Mr. Selvin): What did you say?

A. As I recall it, I referred to the rather broad provisions of the Reorganization Act of Congress, under which the Un-American Activities Committee was set up and established, and I think I pointed out to them that, under that broad language, it would be very difficult or might be very difficult to preclude the committee from pursuing its investigation. We didn't attempt to reach any decision on that. The discussion was to a degree a casual debate between us. The main purpose of the meeting was to ascertain whether or [845] not

(Testimony of Maurice Benjamin.)

we would support them in the position they had taken, and we told them we couldn't for the reasons I have stated.

Mr. Katz: Just a moment. I move to strike that beginning with "The main purpose" as being a conclusion of the witness and ask that the jury be instructed to disregard it.

The Court: It may be stricken. That portion will be disregarded by the jury.

A. The meeting then began to break up and about the time it was breaking up, as I recall it, either Mr. Katz or Mr. Kenny or Mr. Crum, and I am not sure which, asked Mr. Johnston whether or not it was true that he had agreed with Chairman Thomas of the House Un-American Activities Committee as to a blacklist. This came along when the meeting was about breaking up. I didn't pay too much attention to it. But I recall that question being asked and, as far as I can recall, Mr. Johnston's statement in response to that question was that he had entered into no such agreement. That was about the end of the meeting.

Q. (By Mr. Selvin): I show you a document, that has been identified in this case as plaintiff's Exhibit 4. It is a copy of a telegram addressed to the Honorable John Parnell Thomas, Chairman, and so forth, dated October 19, 1947, and there has been testimony here that a copy of this document, one or more copies of this document, was left with you gentlemen the night of that Shoreham meeting. I will ask you [846] to take a look and, after you

(Testimony of Maurice Benjamin.)

have looked at it, state whether or not you have seen that document or any copy of it at any time prior to its introduction in evidence here.

A. No; I have not.

Q. Is it or is it not your recollection that any copy of that document was shown to or left with Mr. McNutt or Mr. Johnston at this Shoreham meeting?

A. My recollection is that the only document that was submitted to us or shown to us was the memorandum of law I have referred to.

Q. Was there any discussion at this meeting with respect to what the attitude or conduct of any of the men represented by Mr. Kenny, Mr. Katz and the others, would be in the event their motion to quash the subpoenas was denied by the Committee?

A. No; there was not to my best recollection.

Q. Was there any discussion at that meeting about how or the manner in which any of these gentlemen intended to answer any questions if called as witnesses before the Committee?

Mr. Katz: We object to that upon the ground it is leading and suggestive.

The Court: I think it is permissible. He may answer.

A. Not to the best of my recollection.

Q. (By Mr. Selvin): Was there any statement at that [847] meeting, so far as you can recall, in substance or effect, that these men, that is, the men represented by Mr. Kenny, and Mr. Katz and

(Testimony of Maurice Benjamin.)

the others, would, if called as witnesses, answer all pertinent questions asked of them?

A. No; there was not.

Mr. Selvin: You may cross-examine.

Cross-Examination

By Mr. Katz:

Q. Mr. Benjamin, as I understand it, you say that you were told that the lawyers representing Mr. Cole, among others, were taking the position that the Committee had no authority to inquire into the area of free speech? You were told that, were you not?

A. I believe I have stated that.

Q. And that is that the attorneys for Mr. Cole, among others, were taking the legal position that this Committee had no authority to inquire into the area of free speech? That was said, wasn't it?

A. I believe so; yes.

Q. And at the same time, after that or during the time that was said, you say that you were reading a memorandum of law in support of that argument or that statement? You were handed a memorandum of law, is that correct?

A. That is correct.

Q. And you examined that document? [848]

A. Rather cursorily.

Q. Let me show you an instrument marked or headed "Memorandum in support of motion to quash," and ask you whether that is the document

(Testimony of Maurice Benjamin.)

to which you referred in your direct examination, or the counterpart thereof. [849]

A. It probably is, Mr. Katz. I didn't read it carefully. I looked at it rather cursorily or casually. It probably is a copy of the same document. I can't be sure.

Mr. Katz: I would like to offer the document in evidence at this time as our exhibit next in order.

Mr. Selvin: We have no objection to it going in in connection with the testimony of the witness with the appropriate instruction, of course, that it doesn't prove the truth or untruth——

Mr. Katz: That is so stipulated. That is one of the matters about which the witness was interrogated on his direct examination.

The Court: I won't allow it to go in, despite the fact you both agree that it may go in, because it is not material. If you want it to go in to be considered by me, all right, but not by the jury because I don't want the jury to go into a discussion of the legal problems.

Mr. Katz: That is agreeable with us.

Mr. Selvin: We have no objection to it being considered by you, your Honor.

The Court: It will be received by the court for the court's consideration only. It will not be sent to the jury as an exhibit. We will call that my exhibit. Call it Court's Exhibit No. 1 and then we will know it does not go to the jury. [850]

Q. (By Mr. Katz): This meeting did take place

(Testimony of Maurice Benjamin.)

The Witness: It is quite possible, as I said before, that some of the embarrassment was expressed with respect to the previous testimony given by that producer in the closed hearing at Los Angeles. I have no recollection. In fact, on the contrary, I doubt that there was any statement made to the effect that that embarrassment caused his difficulty or embarrassment in connection with the taking of a position in connection with the hearings that were scheduled to commence the following day.

Q. (By Mr. Katz): Now, during the course of that discussion, you recall reference was made to the kind of fight which Wendell Willkie had made against an earlier investigation of the content of the screen?

A. No, I do not, Mr. Katz.

Q. You are familiar with the subject of that struggle of Mr. Willkie's?

A. I was there, Mr. Katz.

Q. And you say that at this meeting at the Shoreham Hotel no reference was made by Judge Kenny to Mr. McNutt reminding him or calling his attention to the kind of fight for a free screen and free speech with Wendell Willkie made, and did not Mr. McNutt say, "We will continue to fight in the same way for a free screen" at that meeting?

A. I don't recall the statement, Mr. Katz. He might well have said it. That certainly was our position, to fight [855] for a free screen.

Mr. Katz: That is all.

* * * *

(Testimony of Maurice Benjamin.)

Redirect Examination

By Mr. Selvin:

Q. This somewhat anonymous producer that you and Mr. Katz have been talking about, was he connected or is he connected in any way with Loew's, Incorporated? A. He is not.

Mr. Selvin: That is all.

The Court: Call your next witness.

JAMES J. McGUINNESS,

called as a witness on behalf of the defendant, being first sworn, testified as follows:

Direct Examination

By Mr. Selvin:

The Clerk: What is your name, please?

A. James J. McGuinness.

Q. (By Mr. Selvin): Where do you live, Mr. McGuinness?

A. 911 North Rexford Drive, Beverly Hills.

Q. And what is your profession or occupation?

A. I am a writer-producer. [856]

Q. Employed by whom?

A. Loew's, Incorporated.

Q. And how long have you been so employed?

A. In various capacities for between 15 and 16 years.

Q. And have all those capacities been connected at least in part with the position of a writer in Motion pictures? A. In part, yes.

Q. I take it that you were employed by Loew's, Incorporated in the year 1945? A. Yes.

(Testimony of James J. McGuinness.)

Q. And what was your position or capacity at that time?

A. Well, my title was executive—my contract said “editor in chief”—my function was to exercise editorial supervision of preparation of scripts for the production of motion pictures.

Q. Were you concerned with the employment or the discharge of writers, at that time, as part of your duties? A. No, sir.

Q. You know the plaintiff here, Lester Cole?

A. Yes.

Q. And how long have you known him?

A. I have known him—known of him for perhaps eight or ten years. I have known him since he was employed by Metro-Goldwyn-Mayer as a personal acquaintance.

Q. And that goes back to about when, as nearly as you [857] can recall it?

A. Oh, three or four years, I would say.

Q. During the time that you had been with Loew's, Incorporated, has Mr. Cole ever worked with you or under your supervision in connection with any motion pictures?

A. Yes, in connection with the picture *The High Wall*.

Q. Is that the only one?

A. That is the only one.

Q. And again roughly, when was that period of work?

A. Within the last two years.

Q. Can you state, and if so, will you state what

(Testimony of James J. McGuinness.)

the nature of the relationship was between you and Mr. Cole doing that work on *The High Wall*?

A. Well, the normal professional relationship that existed with any other writer with whom I worked. Do you want me to elaborate upon that?

Mr. Selvin: No, I don't think so. Let me short-cut it:

Q. Were you the producer or the executive producer in charge of that?

A. No. I was the editor in charge. The producer in charge was Robert Lord.

Q. Then, as editor in charge you had supervisory jurisdiction over Mr. Cole's work, is that right? A. Yes. [858]

Q. And was his writing work on that particular picture satisfactory to you? A. Yes.

Q. And did you so express yourself to other officials of the company?

A. Yes. I recommended that the script be put in production.

Q. Do you recall that in the fall or in the winter of 1945 that Mr. Cole was employed with Loew's, Incorporated, as the evidence here shows under what I think is called in the industry, under a long-term contract?

A. Yes, I believe he was—I know he was.

Q. Did you participate in any way, in any of the negotiations or discussions leading up to that employment? A. In no way.

Q. Was your opinion requested by anyone at Loew's, Incorporated, as to whether Mr. Cole

(Testimony of James J. McGuinness.)

should or should not be employed? A. No.

Q. Did you at any time express any opinion or suggestion to anyone with respect to whether or not Mr. Cole should be employed at that time?

A. No, sir.

Q. Was there at about this period, at Metro-Goldwyn-Mayer, an informal body sometimes referred to as the council [859] or perhaps the cabinet?

A. There was an executive council. It wasn't an informal body. It met regularly once a week.

Q. And during that period, did you participate in any of the meetings of that committee or council?

A. Yes, nearly all of them. [860]

Q. At any of the meetings at which you were present, can you state and, if so, will you state whether or not the subject of Mr. Cole's employment came up before the council, for action or discussion?

A. To the best of my recollection, no.

Q. Do you know and, if so, please state with whom the negotiations and arrangements for the employment of Mr. Cole were made?

A. It was my later understanding, which I did not know anything about at the time of his employment one way or the other, that Mr. Jack Cummings recommended, highly recommended Mr. Cole's work on two pictures, "Romance of Rosy Ridge" and a rewrite job on a picture called "Fiesta", I believe, to Mr. Sam Katz, the vice-president and executive producer at Metro-Goldwyn-Mayer and that his contract was negotiated directly and approved directly either with Mr. Mannix or Mr. Mayer or both.

(Testimony of James J. McGuinness.)

Q. Do you know, or have you been since informed that in the fall of 1947 there was some readjustment or revision of Mr. Cole's contract with Loew's?

A. Yes, I was subsequently. I was subsequently informed of that, too.

Q. Did you take any part in the discussions or negotiations leading up to that adjustment?

A. In no way. [861]

Q. Was your opinion or advice asked by anyone with respect to whether or not that adjustment should be made?

A. No.

Q. Did you express any opinion or make any statement to anybody with respect to whether or not that adjustment should be made?

A. No, sir.

Q. Have you at any time stated to any executive or council of Metro-Goldwyn-Mayer, Mr. McGuinness, in substance or in effect, that in your opinion Mr. Cole should not be employed at Metro-Goldwyn-Mayer because you believed him to be a Communist or a radical or a red?

A. No, sir.

Q. You were, were you not, Mr. McGuinness, one of the witnesses subpoenaed to testify before the House Committee on Un-American Activities in Washington in October?

A. I was.

Q. You appeared and did testify at that time?

A. I did.

Q. You were examined by members of the Committee or by one of the investigators for the Committee at that time?

A. I was examined by Mr. Smith and Mr. Strippling and asked questions I think by every member of the Committee then in attendance at the hearing.

(Testimony of James J. McGuinness.)

Q. Let me ask you preliminarily, Mr. McGuinness, whether [862] or not you requested of the Un-American Activities Committee or any representative of that Committee the privilege or the opportunity of appearing before the Committee.

A. I did not. I went in response to a subpoena.

Q. In your testimony, and I don't want you to relate what your testimony was—I am merely trying now to identify a certain subject referred to—in your testimony before the Committee, you were asked, were you not, various questions relating to political affiliations or beliefs of various people in the motion picture industry? A. No.

Mr. Katz: We object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: Well, he answered "No." Did you say "No"?

The Witness: I said "No."

Q. (By Mr. Selvin): You were asked—or were you asked any questions with respect to your opinion or beliefs as to the organizational affiliation of various persons connected with the motion picture industry?

Mr. Katz: I object.

The Court: Just say yes or no. We are not going into the testimony. Merely whether he was asked.

A. I was not asked, that I can recall, directly about the affiliations of anybody. Some names were mentioned in the development of other questions, but not directly from [863] what you are asking me.

Q. (By Mr. Selvin): There was reference in your testimony, however, to the names of various people, certain people whose names we are not con-

(Testimony of James J. McGuinness.)

cerned with, and with respect to their political, social or economic views and affiliations, is that not right? A. That is true, yes.

Q. Did you at any time in your testimony at Washington, either in response to a question by any member of the Committee or an investigator, or at your own instigation, mention the name of Lester Cole in any connection? A. No, sir.

Q. Did you testify, Mr. McGuinness, at a meeting of the subcommittee or of the Committee of the House, Un-American Activities Committee, held here at a closed session, here in Los Angeles, in about May, 1947? A. I did.

Q. And did you request or solicit the opportunity of so testifying there, or were you summoned before that Committee?

A. I was telephoned by a Mr. Stripling and by Mr. Thomas and asked to come down and chat with them off the record.

Q. And did you do so? A. I did, sir.

Q. In any of the discussions which you had there, and we don't want to detail the content of those discussions, except negatively, as I am about to ask you, did you mention the name of Lester Cole in any connection? A. No, sir.

Q. Did you, Mr. McGuinness, yourself, ever request the House Un-American Activities Committee or any subcommittee of that committee to investigate the motion picture industry or the subject of Communism in the motion picture industry or anything like that? A. No, sir.

Q. Did you ever ask anyone else to make such a

(Testimony of James J. McGuinness.)

request to the Committee or of any subcommittee?

A. No.

The Court: Are you dealing with the Washington investigation or previous investigation? I think you ought to specify, as that is an omnibus question, Mr. Selvin.

I am addressing the question to you.

Mr. Selvin: I understand.

Q. I will ask Mr. McGuinness whether or not the answers you have given with respect to whether or not you ever requested any investigation along the lines that I suggested applies to the Washington hearing or do they apply—

A. Yes, it applies to the Washington hearing.

Q. And what about this so-called secret or closed hearing [865] that was held in Los Angeles in May?

A. It applies to that, also.

Q. Now, are you or have you ever been a member of the Screen Writers' Guild?

A. I was one of the founders of the Screen Writers' Guild.

Q. About when was that? A. 1933.

Q. Now, in the course of your activities in your work in the industry, in the Writers' Guild, do you recall meeting Lester Cole? A. No.

Q. Do you have any recollection of meeting Mr. Cole personally at any time prior to the time he came to work at Metro?

A. I had seen him at some meetings but I don't believe I ever met him personally.

Q. And had you engaged in any discussions with

(Testimony of James J. McGuinness.)

him either personally or upon the floor of any Guild meeting? A. Direct discussion, no.

Q. Is it or is it not true that you and Mr. Cole from time to time have been on opposite sides of discussions or arguments in respect to various matters being discussed in the Guild?

A. Well, I haven't been active in the Guild in the [866] years that Mr. Cole has been active in it and there was only one occasion on which there was an active disagreement between us. That was over the formation of the Motion Picture Alliance and the movement by the Screen Writers' Guild to investigate that organization.

Q. You have reference to the Motion Picture Alliance for the Preservation of American Ideals?

A. Yes.

Q. And that is an association of which you are a member? A. Yes.

Q. Have you at any time while Mr. Cole has been at Metro-Goldwyn-Mayer attempted in any way to prevent or terminate his employment by that company? A. No, sir.

Mr. Selvin: You may cross-examine.

Cross-Examination

By Mr. Katz:

Q. You say you are connected with the Motion Picture Alliance, sir? A. Yes.

Q. You were at one time its chairman, were you not?

A. I was. In the first year of its existence I was the chairman of the executive committee of that organization.

(Testimony of James J. McGuinness.)

Q. And you have been a member of the executive committee [867] since you were chairman, have you not? A. Yes.

Q. And since the Motion Picture Alliance was formed?

I will withdraw that.

You know that Mr. Cole is not in the Motion Picture Alliance? A. Yes.

Q. And you also know that a sharp dispute, difference, existed between the organization of which you were chairman, the Motion Picture Alliance, and the Screen Writers' Guild, at one time, did you not?

A. Yes.

* * * *

[868]

Q. (By Mr. Katz): Mr. McGuinness, you have heard the names Smith and Leckie before, have you not? A. Yes.

Q. You know, do you not, that Messrs. Smith and Leckie went to Mr. Mannix and called upon Mr. Mannix to discharge Mr. Cole?

A. I know no such thing.

Q. You have heard that, have you not?

A. I have not.

Q. Well, didn't Mr. Smith—

A. May I ask you—I mean I have not heard that at Metro-Goldwyn-Mayer. I have read it as part of the testimony in this court.

The Court: All right.

The Witness: Am I clear on that?

The Court: Well, that is all right.

Q. (By Mr. Katz): And Mr. Smith and Mr. Leckie met at your home at night, didn't they?

(Testimony of James J. McGuinness.)

A. Met me at my home at night, yes.

Q. And they met you in the summer of 1947, didn't they? [870]

A. They met me some time prior to the investigation in Washington.

Q. Smith and Leckie were investigators of this House Committee?

A. They were investigators for the House Committee on Un-American Activities.

Q. And Mr. Mannix or Mr. Mayer told you at one time or another before you read it in this case that Smith and Leckie had called on him, didn't he?

A. Yes.

Q. And how many meetings did you have with Smith and Leckie at your house?

A. I think two.

Q. Didn't Smith and Leckie ask you to give them phone numbers of certain people, members of the Motion Picture Alliance, who might testify as friendly witnesses against the so-called unfriendly witnesses?

A. They asked me for the phone numbers of men who had testified in the executive hearing in the spring of that year.

Q. And you gave them those numbers, did you?

A. I did.

Q. And then there was a meeting at your house, wasn't there, with Smith and Leckie at which arrangements were made for transporting the so-called friendly witnesses to Washington, isn't that true?

A. That wasn't held at my house.

(Testimony of James J. McGuinness.)

Q. You were present at such a meeting, weren't you? A. I was.

Q. You had some meeting at your house with Smith and Leckie in order to have these other meetings?

A. I didn't have any other meetings. There was one meeting at which——

Q. Well, what other meetings did you attend?

Mr. Walker: Just a moment. Let him finish his answer.

Mr. Katz: I am sorry.

A. I had two meetings with Mr. Smith and Mr. Leckie with reference to the testimony I had given in the executive hearings at Washington and I was asked to repeat that testimony in public, which I did. The meeting for the passing out of transportation was arranged for the convenience of all concerned, so that Mr. Leckie and Smith wouldn't have to travel all over town.

Q. Where did this meeting for the arrangement of transportation take place, if it was not held in your company's office?

A. That meeting was held in the offices of the Motion Picture Alliance on Beverly Drive.

Q. All right. Now, don't you remember that you were on opposite sides of the debate with Mr. Cole, when you were speaking for the Screen Playwrights and Mr. Cole for the [872] Screen Writers Guild? A. No.

Q. Would you say that that did not occur?

A. No. And I don't remember Mr. Cole in con-

(Testimony of James J. McGuinness.)

nection with that matter. Perhaps you can refresh my recollection.

Q. I will attempt to. Do you recall that there was a struggle before the National Labor Relations Board between the Screen Playwrights, on the one hand, and the Screen Writers Guild on the other hand? A. Yes.

Q. And you were with the Screen Playwrights, weren't you?

A. I was inactive at the time. I was a member but I did not participate in that campaign, to the best of my knowledge.

Q. As a matter of fact, you were one of the officers in the Screen Playwrights, weren't you?

A. Not at the time of the National Labor Relations Board action.

Q. You were an officer before or later?

Mr. Walker: I am going to suggest that you give the witness an opportunity to complete his answer.

The Court: Yes.

Mr. Katz: All right.

The Witness: I was a member, to the best of my recollection, [873] in the first year of the formation of Screen Playwrights, I was a member of the board of directors of that organization and I may have been a member of the board in the second year, but I am not clear on that.

Q. (By Mr. Katz): And there was strong difference between the Screen Playwrights and the Screen Writers Guild over a number of years, was there not? A. No, not that I recall.

(Testimony of James J. McGuinness.)

Q. You mean charges were not made by the Screen Playwrights about the so-called un-American activities of the Screen Writers Guild or certain persons in it?

A. No. As I recall the matter—if you want the history of it, I will give it to you. The Screen Writers Guild as such was in existence during most of the period of the Screen Playwrights.

Q. Was it in existence during the Labor Board election between the Screen Writers Guild and the Screen Playwrights? A. Yes, it was.

Q. That was a sharply contested election?

A. Yes, it was.

Q. Feelings ran high between the members of both groups, did they not?

A. In some cases, yes.

Q. And is it your testimony that you did not know that Lester Cole was active for the group which was opposed to your [874] group, the Screen Playwrights?

A. Yes. That was my testimony and I made it specifically in relation to the election because I told you I took no active part in that campaign.

Q. Well, you knew that Mr. Cole was taking the vote for the Screen Writers Guild, didn't you?

A. No, I did not.

Q. You knew that he was vice president of that Guild, didn't you?

A. I knew that he was vice president at one time.

Q. You said something about the nature of the

(Testimony of James J. McGuinness.)

relationship between yourself and Mr. Cole insofar as he as a writer was concerned. It is true that there were sharp differences between you and Mr. Cole on the matter of social or political trade union problems, was there not?

A. Well, my viewpoints are different than his on those matters completely.

Q. And you so expressed yourself publicly, did you not, as having different views than the views he was supposed to have?

A. I never expressed any relationship to Mr.—any public statement about Mr. Cole.

I expressed my viewpoints about a condition existing in an organization and about various organizations.

Q. And that insofar as that condition was concerned, [875] you identified Mr. Cole with it at least in your own speaking with friends and others, didn't you?

A. What do you mean by speaking with friends and others? You have been asking me about public debates and I would like to know just what you mean.

Q. Well, now, you say you don't remember the public debate?

A. I don't recall any public debate between Mr. Cole and myself. If there was one, I would like to refresh my memory.

Q. Wasn't there another difference between you and Mr. Cole which was discussed right at Loew's, about the fact that Mr. Cole had been unwilling to

(Testimony of James J. McGuinness.)

cross a picket line around the studio at one time and you made some comment about the fact that he would not cross a picket line? Don't you remember that?

A. No. I remember when he wouldn't cross the picket line but I remember no discussion between me and Mr. Cole in relation to that.

Q. Well, did you discuss it with anyone else?

A. No. I heard other people discuss it. I didn't enter the discussion.

Q. Did you know of this discussion concerning Mr. Cole's unwillingness to cross the picket line?

A. The one I refer to was very casual, the one which [876] took place in the executive dining room of Metro-Goldwyn-Mayer overlooking the picket line, discussing the course of the mass picketing of Metro-Goldwyn-Mayer.

Q. Did you participate in that discussion?

A. No. I just shrugged my shoulders.

Q. Did you listen to it?

A. Not very much.

Q. Did you say anything about it?

A. Not that I recall. [877]

* * * *

Q. (By Mr. Katz): Did you at one time state as follows under oath: "And I think the first day several writers, including Mr. Cole, did not cross it and subsequently they did, as I recall the incident. There was some discussion about that, but it involved all the writers who did not cross the line at that time."

(Testimony of James J. McGuinness.)

Then you were asked, "Who was that discussion with?" And answered: "That was pretty general discussion. Most of it took place at lunch when they were looking out at the picket line down below. It was not an official meeting to discuss it. It was just that the events were taking place under the eyes of everybody concerned, and I guess there was a good deal of it." A. Yes.

Q. Does that refresh your recollection?

A. That seems to me to be in substance what I just said. I did not participate in discussion. I heard some it and [878] went and sat down.

Q. You were in the group?

A. I was in the group.

Q. Of executives, when it was discussed?

A. Surely. I went to the window and looked out and saw the picket line. [879]

Q. (By Mr. Katz): You had a discussion, did you not, with Mr. Mayer, at which he expressed a difference with you concerning the matter of your testimony before the House Committee or at one or the other of the hearings, did you not?

A. No.

Q. Did you ever talk with Mr. Mayer?

A. Yes; frequently.

Q. And did he disagree with you?

A. About what?

Q. About your testimony or your position.

A. I have never discussed that with Mr. Mayer.

* * * *

ERIC JOHNSTON,

a witness for the defendant, being first duly sworn, testified as follows:

The Clerk: What is your name, please?

A. Eric Johnston.

The Clerk: That is "ston"?

A. Yes.

Direct Examination

By Mr. Walker:

Q. Mr. Johnston, you are and have for some time past been the president of the Motion Picture Association of America, Inc., is that correct? [881]

A. Yes.

Q. And I believe you are also the president of what we have referred to here as the West Coast Organization, which is—will you give us the title of that?

A. Motion Picture Producers Association.

Q. Most of your time is spent in and your principal office is in Washington, D. C., is that not correct? A. Yes.

Q. But you do also have an office in New York?

A. Yes.

Q. And there is also an office out here, which I assume serves the purpose of being an office for both associations, is that correct? A. Yes.

Q. And you spend a substantial part of your time in each of these offices, do you not?

A. Yes.

Q. When did you become president of the Motion Picture Association of America?

(Testimony of Eric Johnston.)

A. On September 15, 1945.

Q. And prior to the time that you became president of that organization, what was your business or profession or occupation?

A. I was president of the United States Chamber of Commerce. [882]

Q. And, besides holding that position, are you engaged in any business or were you engaged in any business on your own behalf?

A. Yes. I have four small businesses up in the Pacific Northwest.

Q. Located up in the State of Washington?

A. Yes; state of Washington; Spokane and Seattle.

Q. Those are, generally speaking, manufacturing businesses?

A. Two of them are manufacturing businesses; one is a wholesale business and one is a retail business.

Mr. Walker: I think these gentlemen will not mind leading questions to this extent, in order to shorten the examination.

Q. You were at one time the president of the Spokane Chamber of Commerce?

A. That is right.

Q. And later, before you became president of the United States Chamber of Commerce, you were for some time a director of that organization?

A. I was a director and vice president of it.

Q. For a period of approximately 12 years?

A. Correct.

(Testimony of Eric Johnston.)

Q. Were you a member of the InterAmerican Economic Development Commission? [883]

A. Yes.

Q. And a member of the Economic Stabilization Board? A. Correct.

Q. And you were a member of the War Manpower Board? A. Yes.

Q. And a member of the War Mobilization and Reconversion Board?

A. Yes. Those were all war boards during the war.

Q. They were all war boards?

A. Yes; during the war.

Q. Reference has been made here, Mr. Johnston, to a meeting that was held in Washington, D. C., on the night of October 19, 1947, a meeting at which were present yourself, Mr. Paul McNutt and Mr. Maurice Benjamin, and also six lawyers representing a group of motion picture writers, producers or directors, of which group Mr. Cole, the plaintiff in this action, was one. Do you recall such meeting? A. Yes; I do. [884]

Q. Do you recall the circumstances under which that meeting was called or took place?

A. Yes. Mr. Bartley Crum, who was associated with Mr. Cole and his group——

Q. As one of the attorneys?

A. As one of the attorneys—called Mr. Chafitz, who was one of my assistants, and asked if we would meet with Mr. Kenny and himself at some time which was convenient. Mr. Chafitz came to me and

(Testimony of Eric Johnston.)

told me about it and I said, of course, we would be very happy to meet with them. Then Mr. Crum called me on the phone and asked if we would meet with them, and I said yes, and to be at Mr. Paul McNutt's apartment at the Shoreham, in Washington, on Sunday evening.

Q. And the people who were present were the people I have indicated?

A. Yes. Instead of Mr. Crum and Mr. Kenny only, there were also four other gentlemen appeared.

Q. And you were informed they were also of legal counsel for the group that was represented by Mr. Kenny and Mr. Crum?

A. Yes, sir; that is right.

Q. I wish you would state in your own way and to the best of your recollection your participation and the extent of your participation in any conversation that occurred and, as best you recollect it, what took place, what transpired [885] and what was said by the various parties.

A. The first question was one as to whether we would cooperate with them in attempting to quash the indictments before the House Un-American Activities Committee.

The Court: You say the indictments. Do you mean the hearings?

A. Yes, your Honor; the hearings.

The Court: Are you an attorney?

A. No; I am not.

The Court: I thought you had received some legal education.

(Testimony of Eric Johnston.)

A. I did but I am not legally trained. A little knowledge is a dangerous thing.

The Court: That is correct; I agree with you on that.

I sat not in your District but in the Eastern District of Washington and I gathered some information while sitting there that made me think you were an attorney.

Mr. Walker: I am sure you will agree with me, gentlemen, and that Mr. Johnston will, too, that the matter he is referring to is an intended motion by Mr. Cole and others of the group, of which he was a part, to quash the subpoenas that had been served upon members of this group. Is that correct?

Mr. Margolis: Do you want a stipulation that that is what was presented? [886]

Mr. Walker: I was just trying to correct his statement, the statement of Mr. Johnston that it was with reference to indictments.

The Court: He used the word "indictments" and there was no indictment at the time he is talking about.

* * * *

A. I told them we could not join with them because I had already sent a letter, which had been made public, to the House Un-American Activities Committee, in which I told them we welcomed investigation of Communism in Hollywood, and that we would cooperate with them, urging them, however, to have a fair and just hearing. Therefore,

(Testimony of Eric Johnston.)

that we could not cooperate with them in their request. I further stated that I felt that the matter that they were discussing was a legal problem; that we had Mr. McNutt and Mr. Benjamin, who were attorneys representing us, and I felt they should discuss the matter. Then rather a lengthy, or not very long, conversation took place between Mr. Benjamin and between the group representing Mr. Cole as to some legal phases of it, to which I paid very little attention. In the first place, I didn't know quite what they were talking about and, in the second place, I was paying attention to other things. It was finally determined they would go and then they left. One of the gentlemen, I think it was Mr. Kenny, although I am not positive of that, asked me, or he said, "It has been [887] understood generally that you have made a deal or an arrangement with the House Un-American Activities Committee to blacklist these men," and I said, "Of course, I have made no deal with the House Un-American Activities Committee." I think the group left approximately at that time or shortly thereafter and I don't recall anything else that took place.

Q. (By Mr. Walker): Let me ask you this. According to your best recollection, what was the duration of this meeting?

A. I don't think it lasted more than 30 or 40 minutes and much of it was pleasantries and not concerned with the problems involved. I think the problems involved were even shorter than that.

(Testimony of Eric Johnston.)

Q. Do you recall having handed to you or seeing handed to anyone else a document which purported to be a copy of a telegram sent by the attorneys for this group, of which Mr. Cole was one, in which they set out the grounds upon which they proposed to make their motion to quash the subpoenas?

A. No: I do not recall seeing such a telegram.

Mr. Walker: May I have Exhibit No. 4?

Q. I would like to hand you Plaintiff's Exhibit No. 4 and ask you whether or not you recall seeing that or any document similar to it at the time of the meeting? [888]

A. No, sir, I do not recall seeing it.

Q. (By Mr. Walker): Do you recall whether or not these attorneys, other than Mr. McNutt and Mr. Benjamin, had in their possession and presented for inspection by anyone any written document?

A. It seems to me that they did have some kind of a written document but I am not at all familiar with what it was. I do not remember it nor do I think I ever saw it, sir.

Q. When you say you never saw it, you mean you saw some document?

A. That I never read it.

Q. But you did not inspect it?

A. That is right.

Q. And as far as you can recall, no such document was handed to you?

A. No. I am quite positive of that.

(Testimony of Eric Johnston.)

Q. Now, Mr. Johnston, leaving the meeting at the Shoreham, I would like to go back to the Motion Picture Association of America and ask you what the organization of that association is? Now I am talking about how it is set up and what departments it has and what functions it performs in a general way.

A. It is a trade association for the benefit of the motion picture industry, those members who belong to it.

It has offices, as has been stated, in [889] New York and in Washington and in Hollywood. We also maintain offices in London and Paris and Cairo and certain other cities, because we do business all around the world.

One of the functions of the Association is to take care of the business interests of its members in various countries in the world and we do business in every country in the world, including Russia and countries behind the Iron Curtain.

Another function of the Association is to take care of what we call the production code administration. That is a code of self regulation of the industry relating to morals and good taste and things in pictures.

Another department of the Association deals with copyrights and the registration of those copyrights.

Another one deals with advertising and the necessary corrolation of advertising activities.

Another one deals with legislative matters in

(Testimony of Eric Johnston.)

both the United States and in the various states, because there are constantly legislative matters arising such as bills for censorship of the industry or taxes or one thing or another of that kind or nature.

Another departments deals with community service, that is to assist women's clubs and fraternal organizations in securing information which they wish about motion pictures.

Another department deals with public relations of the industry for gathering of information on what the public is [890] thinking about motion pictures or about the industry, and transmitting and relaying that information to its various members.

There are several other activities, Mr. Walker. Is that sufficient or do you wish me to go into more detail?

Q. (By Mr. Walker): Well, do you have any contact with the Congress of the United States?

A. Yes.

Q. For any reason?

A. That is the legislative department that I mentioned. Yes, we have a staff in Washington that contacts Congress constantly, to see what Congress is doing and to protect the interests of the motion picture industry before the House of Representatives and the Senate, and the legislative branches.

Q. And I take it that you have to deal with the office of the Secretary of State, if you have these interests of which you speak in foreign countries?

(Testimony of Eric Johnston.)

A. Yes. We have to deal with the office of the Secretary of State and the Secretary of Commerce, the Army and the Navy, because the Army and the Navy are entirely responsible for showing films in such countries as Germany, Austria, Korea, Japan—we have to deal with the foreign diplomats of all of the countries in the world who have residence in Washington, because we show pictures in those various countries.

Q. What processes do you use in order to gather what you deem to be information in regard to attitudes of the public with reference to the motion pictures or the motion picture industry?

A. Well, we have a clipping service—— [892]

* * * *

(Pending question read by the reporter.)

A. We have a press clipping service that gives us press clippings as to what newspapers say editorially and in their news columns throughout the United States.

We have representatives of our organization who are assigned to test public opinion in various quarters. For instance, one is our labor man who is in constant contact with labor organizations; another one, who is in contact with the foreign situation; another one in contact with the legislative situation in the various states; another one in contact with business organizations; another one in contact with teacher and educational organizations; and so forth. [893]

It is our desire to be constantly informed as to

(Testimony of Eric Johnston.)

what public opinion is, regarding the motion picture industry and pictures both in the United States and in foreign countries.

Q. (By Mr. Walker): You, yourself, have already testified that you move between New York and Washington and Los Angeles. I assume that you also visit other sections of the country?

A. Yes, I visit a great many other sections of the country. I make a great many public speeches and as a result I am around the country in a good many places.

Q. And you contact a great many people, also public opinion in a great many places?

A. As an old newspaper man said, that is one of my jobs, to find out about what is going on in public opinion.

Q. Now, the meeting at the Shoreham Hotel which was held on October 19th, was held obviously the night before the opening of the hearings of the Un-American Activities Committee investigating the infiltration of Communism into the motion picture industry?

A. Yes, Mr. Walker.

Q. In other words that hearing opened on the 20th, is that not correct?

A. I believe that is.

Q. And did you hear any of the—you testified, did you not, at that hearing? [894]

A. Yes. I testified at that hearing.

Q. Do you recall or shall I refresh your recollection as to the date upon which you gave your testimony?

(Testimony of Eric Johnston.)

A. I have forgotten. I think it was October 27th. Is that correct?

Mr. Walker: Well, your memory is quite correct. I have just found the place in the transcript in the hearings, and you testified on October 27th, 1947, and that evidently accords with your recollection.

Now, you were at Washington on October 19th?

A. Yes, sir.

Q. Were you there during any of the period between October 20th and the date upon which you gave your testimony?

A. Yes. I was there all that time with the exception of one day when I was in Chicago.

Q. And did you attend any portion of the hearings?

A. Yes, I attended a portion of the hearings.

Q. Can you give us some idea of the extent of your attendance upon the hearings?

A. Yes.

* * * *

[895]

A. Yes. I heard the testimony of Mr. Lawson. I heard the testimony, a portion of the—

* * * *

[896]

The Witness: Thank you, your Honor.

I heard Mr. Lawson testify. I heard portions of the testimony of several of the other men. I was constantly told what the testimony was. As a matter of fact, I had practically hourly reports about what was going on although I wasn't there all the time.

Q. (By Mr. Walker): Did those reports come to you from members of your organization?

(Testimony of Eric Johnston.)

A. Yes, members of the organization who were there to observe the hearings. [897]

Q. And that was true throughout the hearings except as to those periods when you yourself were present?

A. That is correct, except for the one day that I was in Chicago.

Q. Well, with reference to the one day when you were in Chicago I understand you to say that you did not receive hourly reports?

A. That is right.

Q. And did you at any time receive a report as to what had transpired during the period when you were at Chicago? A. No, I did not.

Q. Do you remember what date that was?

A. I think it was October 28th. I think it was the day after I testified.

Q. Now, from what other sources, if any, did you obtain information as to what transpired at these hearings?

A. I received information from editorial comment, from the clipping service. There were a large number of editorials written in the newspapers in America, and those, of course, came across my desk. I also received information from news stories as to what the press thought. I also received information from members of Congress with whom I was in contact as to what they thought of the hearings. Congressman Mundt, who is Senator Mundt now— [898]

Mr. Kenny: Just a moment, your Honor.

The Court: No. That may be stricken.

Mr. Kenny: We were talking about Senators.

(Testimony of Eric Johnston.)

The Court: Yes.

Mr. Kenny: It will save objection.

The Court: I don't think any names should be given at all by anyone.

Q. (By Mr. Walker): All right, if you will proceed and put the people in the different categories.

A. Information came to me from people who had been across the country recently, during these hearings, as to what reaction they found in various portions of the country concerning the hearings.

Information came to me from my own staff. As I tried to point out to you, a few minutes ago, we have a staff that is trained and attuned, through these various organizations in various portions of the country, as to what they were thinking. Information came to me from them.

Information came from friends of mine, from business acquaintances, from friends of mine in farm organizations and in labor organizations as to what the country was thinking about the motion picture industry and the gentlemen who were testifying or who were before the House Un-American Activities Committee.

Mr. Katz: Mr. Walker, we would like the record to show [899] our objection to the question on the ground that it is immaterial, and that it is a conclusion of the witness, particularly about the fact that they had people who were trained and attuned to judge public opinion, as being a conclusion and immaterial in this case.

(Testimony of Eric Johnston.)

The Court: Well, that statement may be stricken. I think the persons may be identified by designating their occupation, if necessary, but no comment should be made as to whether they are trained, because we are getting into the realm of speculation, because who is trained and who is not trained in public opinion? That may be stricken, that particular statement.

Q. (By Mr. Walker): Is it true, Mr. Johnston, that the people to whom you referred as people who were trained and attuned were people who—

Mr. Margolis: That has just been stricken.

The Court: No. I have stricken that.

Mr. Margolis: You have stricken that.

The Court: That is the danger; we are getting into a qualitative analysis of the information he received.

Mr. Walker: All I want to find out is if the people he so referred to were people who were employed by the organization, as he has heretofore testified to.

The Court: No. I have stricken the question. He can testify who the people were. It is for the jury to determine [900] whether the people were trained and how well they were trained.

Q. (By Mr. Walker): All right. Who were the people who obtained for you the information that you have referred to, Mr. Johnston?

A. The men who were assigned to contact labor organizations, the man who is assigned to contact the theatre owners who exhibit pictures, and who in turn are supposed to be familiar with conditions in their local areas.

(Testimony of Eric Johnston.)

Mr. Margolis: We move to strike.

The Court: No. Strike that out.

The Witness: I beg your pardon, your Honor.

The Court: Just please describe them, without passing upon the efficacy of their services.

The Witness: All right.

The Court: All right.

The Witness: The men who were assigned to cover legislative matters, the personnel who were assigned to cover fraternal and religious and educational organizations. These are the men and women who bring me information as to what is going on and what the action, the attitude of the people was.

Q. (By Mr. Walker): Now, these people that you refer to were people in the employ of the organization?

Mr. Margolis: Just a moment.

A. Yes. [901]

Mr. Margolis: I want to move to strike "who bring me information" as to public attitude, because that is a conclusion that they knew—that in effect is qualifying them as experts on knowing what the public attitude is, and they may have brought him information but to characterize that information I think is improper, your Honor. [902]

The Court: I will allow that to remain, but again I suggest that Mr. Johnston confine himself to giving the sources, without passing judgment upon the validity of the information that he received. You have not attended this lawsuit. That is a very sensitive topic in this lawsuit.

* * * *

(Testimony of Eric Johnston.)

Mr. Walker: I will say to you, Mr. Johnston, that this envelope contains photostats of what purport to be, and I think counsel will stipulate, are correct representations of various articles appearing in various newspapers of this country, and I shall not further designate them, which were [903] receive in your office and forwarded by your office to me or to Mr. Selvin some time ago? I will ask you to look at them.

* * * *

The Court: All right. The conduct of counsel doesn't require any admonition.

Q. Mr. Johnston, I will show you this document. I won't name it. We will call it "it". Do you recognize it as a photostat of anything that you have seen before? A. Yes, I do. [904]

Q. Well, what is it?

A. It is editorials from newspapers throughout the United States.

The Court: All right. Let me ask you this, are they correct photostats? Are they enlargements or not? A. No.

Q. They are identical?

A. They are identical.

Q. They are photostats of actual editorials?

A. Yes, sir. They are made by this organization's press clipping bureau, not by ourselves.

The Court: All right. This is sufficient to identify the document. Mark it for identification.

The Clerk: It is defendant's Exhibit G marked for identification.

(Testimony of Eric Johnston.)

[Note: Defendant's Exhibit G is not reproduced because of its nature and bulk. It consists of a large number of photostatic copies of editorials appearing in newspapers throughout the United States commenting upon the hearing before the House Committee on Un-American Activities at which appellee appeared, upon the conduct and testimony of witnesses, who did not disclose whether they were or had been members of the Communist Party and upon the aims, objects and public standing of the Communist Party.]

The Court: All right, now, take over from there.

Q. (By Mr. Walker): You were able to identify them. Can you tell us during what period, if any, they were called to your attention?

A. Yes. Those were editorials which were called to my attention between the time of the beginning of the House Un-American Activities hearing there in October and our meeting in the Waldorf in November.

* * * *

[905]

Q. (By Mr. Walker): I show you another group of photostats and ask you if you have seen those before.

A. Yes, sir.

Q. And will you give me a general description of them?

A. Yes. These are editorials from newspapers throughout America that came into my office, some of them seemingly before our meeting at the Waldorf

(Testimony of Eric Johnston.)

in New York, and some of them after, but they were along the same line as the others.

Mr. Walker: May I ask that these be marked for identification?

The Court: All right; they may be so marked.

The Clerk: Defendant's Exhibit H, marked for identification.

[Note: Defendant's Exhibit H is not reproduced because of its nature and bulk. It consists of a large number of photostatic copies of editorials appearing in newspapers throughout the United States commenting upon the hearing before the House Committee on Un-American Activities at which appellee appeared, upon the conduct and testimony of witnesses, who did not disclose whether they were or had been members of the Communist Party and upon the aims, objects and public standing of the Communist Party.]

Q. (By Mr. Walker): Mr. Johnston, there have been various references here to a meeting held at the Waldorf-Astoria Hotel in New York on November 24th and November 25th. Do you recall such a meeting? A. Yes, sir.

Q. I don't ask you to enumerate the people who were present but can you give me the designation of the people who attended that meeting?

A. Yes. There were the heads of the motion picture industry both from the New York offices and Hollywood offices, who had been called back to Washington to attend this meeting.

(Testimony of Eric Johnston.)

Q. And do you recall approximately what time of the [907] day the meeting commenced?

A. Yes; it commenced at noon on the 26th, as I recall it. Or was it the 24th?

Q. The 24th. A. The 24th.

Q. It has been so identified in the evidence here.

A. Yes.

Q. Were there present at that meeting any whom you knew to be officers of the defendant Loew's, Incorporated, the defendant in this action?

A. Oh, yes; there were a great many from Loew's present. Do you want me to name them?

Q. Yes; if you recall who they were.

A. Mr. Schenck, president of Loew's; Mr. Rubin, vice-president and chief counsel; Mr. Louis B. Mayer, who was in charge of their studio in Hollywood; Mr. Eddie Mannix, who is an officer of the organization in Hollywood, and there may have been some others.

Q. The Mr. Schenck to whom you refer is Mr. Nicholas Schenck?

A. Yes; Mr. Nicholas Schenck, president.

* * * *

[908]

Q. Mr. Johnston, will you tell, as well as you can, what transpired at the meeting at the Waldorf Hotel? I will let counsel object and I will seek to answer the objection.

* * * *

[909]

A. The meeting started and there was a large number of people present, representatives from almost all of the motion picture studios in Hollywood and in New York, who were present. I presided at

(Testimony of Eric Johnston.)

the meeting. I started by telling them about the foreign situation, our falling revenues abroad. I also told them about the reaction which had taken place in certain South American countries as the result of the testimony of the so-called ten men before the House Un-American Activities Committee. I then pointed out to them—

* * * *

[912]

A. I told them what editorials I had read, that our office had seen and that I was personally familiar with; that the tenor of these editorials was that these men had behaved [913] like Communists; that they had brought discredit to their employer and to the industry. I related to them what the Commander of the American Legion had told me of action at one of the posts in Kansas, in which they were going to boycott American pictures because of Communist activities of these ten men. I told them that the Commander of the American Legion had told me that he would like to stop this if he could. I told them that a situation of this kind might snowball into large proportions in other Legion posts. I told them of the action at Chapel Hill, at the University of North Carolina, where a group had boycotted a picture. I told them of conversations I had had with my own staff regarding the actions of these 10 men and that the impression was that, if they were not Communists, at least they were acting like it, and had brought discredit to the industry and to their employers. I told them about my personal experiences with business men, farmers and laboring people, whom I had talked to. I discussed with them at some

(Testimony of Eric Johnston.)

length the reaction which we were getting from organizations that we were in touch with. I told them that I thought they had two courses of action open to them and that they would have to choose what they desired to do; that all my position was was to notify them as to the facts which I had found, and that I felt from there on it was up to them to make a decision; that either they had the right to employ these 10 men, and they had the right [914] to employ them, and to continue to tell the public they were keeping subversive or Communist material on the screen; that that was the right which they had but that it would be a right which would be difficult because there was beginning to snowball public opinion to the effect that the industry was harboring Communists, whether it was true or not; that it was a feeling which was beginning to permeate the United States; or, on the other hand, they could take action by not employing these 10 men, who, in my opinion, had indicated to the public by their actions that they were certainly either Communists or Communist sympathizers. I told them that, in my opinion, either one of those two actions would have to be taken; that it was not for me to recommend what action they should take but they individually should do what they felt was the right thing to do under the circumstances. Several people spoke at the meeting, including Mr. Mayer, who spoke after I did, and he agreed with, I think, everything I said, and he was quite emphatic that we should take the second course of action. Then Mr. James Byrnes, our counsel, spoke, and spoke at considerable length, about

(Testimony of Eric Johnston.)

what he felt they should do and he felt that the second action should be taken; that there were some legal risks involved in taking the second action but he thought, with all of the circumstances involved, it was an action which should be taken and he recommended that it be taken. He was followed by his [915] associate, a Mr. Russell, who made about the same recommendation. Then several people spoke on the subject, including the legal staff of many of the companies who were present and including some of the officers of the companies. Everyone there seemed to agree that the second course of action should be taken.

The Court: Did Mr. Mannix participate?

A. Mr. Mannix participated and so did Mr. Mayer and all seemed to feel the second course of action should be taken. The only question was as to the procedure in the second course of action, exactly what should be done. There seemed to be no doubt that these 10 men by their actions before a Congressional Committee—

Mr. Margolis: Just a moment. This is a characterization of what was said and not a report on the meeting.

The Court: I think the last sentence should be stricken. Go ahead. You were doing very well. Keep to the narrative.

* * * *

A. Gentleman after gentleman arose and stated that [916] he felt that, and each one individually expressed it in his own way, that, by bringing scorn upon the industry and upon the employer, these men

(Testimony of Eric Johnston.)

had brought such discredit to the industry that they couldn't be retained in employment, and that the clause of their contracts, which allowed the contracts to be discontinued in case they brought scorn or any other public ill feeling towards their employer or to the industry, should be invoked. There was so much discussion about it that I felt—and each one had a little different approach—that I felt a committee should be appointed to determine what action should be taken. The group approved the appointment of a committee and a committee was so appointed by me. [917] Mr. Nicholas Schenck was the chairman of the committee. I do not recall all of the members that were on the committee but it seemed to me that everybody wanted to get on the committee. And the result was it wound up by at least half of those present being on the committee. So I can't tell you all who were on it. They met after we adjourned, which was about 5:00 o'clock—

Q. (By Mr. Walker): Pardon me for interrupting. At the time the committee was appointed, as I understand you, that practically concluded or did conclude the first day of the meeting, is that correct?

A. That concluded the first day of the meeting. The committee then met after we adjourned and they had deliberations that night, and the next morning we met and Mr. Nicholas Schenck brought in a resolution which he said was satisfactory to the committee. Mr. James Byrnes, our legal counsel, read the resolution and he read it very carefully. He read it completely first and then he read it sentence by sentence and asked if there were any changes or

(Testimony of Eric Johnston.)

corrections. And there were a number of changes and corrections. There were objections to this or feeling that this should be strengthened or something else should be changed, and this took over a period of two or three hours in which this matter was discussed. And, finally, a resolution was prepared that seemingly all present could agree to. Then Mr. Manix spoke up [918] and said that he didn't know whether this should be done or not because of the California labor laws, which might mean within the State of California that maybe this couldn't be done. Mr. Byrnes, our counsel, then spoke up and said that he had examined the California State Labor Laws and that, in his opinion, this was in no way a violation of the State Labor Laws of California. Mr. Russell, his assistant, also spoke on the same subject and I believe one or two of the other legal counsel present, who came from California, also spoke up to the same tenor. Then Mr. Goldwyn objected and said that he felt that he didn't want any part of this; that he felt they shouldn't go ahead with it. I then arose and said that, in my opinion, these men would have to make up their minds—I think I used the expression “they would have to fish or cut bait”—that I was sick and tired of presiding over a meeting where there was so much vacillation; but I had no authority to do anything; that I wasn't like the czar of baseball who discharged people if their conduct wasn't satisfactory and seemingly had that authority; but I had no such authority; that either they adopt one or two of these other alternatives, in my opinion, continue to employ men who were sup-

(Testimony of Eric Johnston.)

posedly Communists and justify that employment in the eyes of the American public or they would have to take the other alternative and not employ them. But for goodness' sake, to make up their minds one way or another [919] There was some discussion took place after that and finally it was agreed they would adopt this resolution, which was finally adopted. And the specific question was asked by me of Mr. Donald Nelson, who was a representative of the Society of Independent Producers, of which he was their president at that time, whether he agreed to this. He said he did. And I believe one gentlemen asked Mr. Goldwyn if he agreed to it and I think someone asked Mr. Wanger if he did, and they said they did and they would go along.

The Court: Did Mr. Mannix finally agree to it?

A. Mr. Mannix went along; yes. And I think with that the meeting adjourned for lunch, and we had lunch the second day. At that lunch we discussed means and methods of implementing this agreement by working with the Guilds in Hollywood, to elicit their help and cooperation. I mentioned that in previous testimony before the House Un-American Activities Committee I said that I felt that management and labor were responsible for cleaning their house of Communists; that that was a job for management and labor working together; that I personally believed that a Communist was a foreign agent and subversive, and that I personally wouldn't employ a Communist, a known Communist, because he was, in my opinion, a foreign agent, working for a foreign government. I said I felt it was up to management

(Testimony of Eric Johnston.)

and labor to work together as closely as they could on this problem; that this was one of the things [920] in which I felt that management and labor had a mutual responsibility to help solve. I think shortly after that the meeting adjourned and each went to their respective places.

Mr. Katz: In connection with that recital, I think we are entitled to an instruction that none of the matters stated here are to be taken as true and correct; that it is merely a statement at which Mr. Cole was not present, at which no representative of Mr. Cole was present and no representative of any guild or union is shown to have been present, and it merely goes into an attempt—it is only for the purpose of showing what led up to the action which resulted in what we call the blacklist but that they call the termination of the ten men. It seems to me we are entitled to some admonition following this statement.

The Court: Before I give the admonition, I want Mr. Johnston's attention called to the resolution, so we will know—

Mr. Walker: I have it right here on the lectern and will present it to him and have him identify it.

The Court: Isn't it already in the record?

Mr. Walker: No, your Honor. It was read in the record but it hasn't been put in the record as an exhibit. I think probably it should be put in as an exhibit or at least for identification so that we can refer to it.

The Court: Ladies and gentlemen of the jury, I will [921] repeat the admonition I gave you when

(Testimony of Eric Johnston.)

Mr. Mayer testified to some of the facts which Mr. Johnston has given us now in detail. The only reason why this is brought in at all is to show what led up to the action which Mr. Mayer actually took; and, if the plaintiff had not taken the burden of bringing in this evidence, in an endeavor to show what they contend to be a different intention, this testimony would be entirely immaterial. As it is, it is not to be taken as either true or false. It is merely to be considered as having been said or done at the time and as having preceded the taking of the particular action. Ultimately, it is up to you, on the basis of the instructions that the court will give you, to determine whether the conduct is of such character as had the effect stated; and you are not to take Mr. Johnston's opinion that he gave at that time as bearing upon your determination of whether it did have that effect at all or not. All right.

Mr. Walker: Will your Honor make clear to the jury that Mr. Johnston's statement, however, is evidence as to the things that Mr. Johnston said?

The Court: That they were said at the time; yes; that is right. You are the judge of the testimony of every witness and every witness, including Mr. Johnston, is presumed to tell the truth and, ultimately, if there is a conflict between Mr. Johnston and somebody else, it is up to you to determine which version you are going to believe, assuming there is a conflict. [922] I cannot tell you anything except that, if you believe Mr. Johnston, then you have a right to assume that he made the statements that he says he did but not as to whether the statements that he

(Testimony of Eric Johnston.)

made, either by way of information or deduction, are true or not; that he made the statements but not whether they are true or not.

Mr. Walker: Except as he may have made them and it appears he made them of his own knowledge.

The Court: No. I have already given the admonition that I agreed to give, without amplifying the matter. I think the jury understands. Go ahead.

Q. (By Mr. Walker): Mr. Johnston, you referred to Mr. Sam Goldwyn. Although there is a similarity with one of the names in the studio, Metro-Goldwyn-Mayer, will you tell us whether or not Mr. Sam Goldwyn is, to your knowledge, in any way connected with Loew's, Inc., or the studio known as Metro-Goldwyn-Mayer.

A. No; I believe he is not connected in any way with Metro-Goldwyn-Mayer.

Q. Or with Loew's? A. Or with Loew's.

The Court: He is what they call an independent producer?

A. Yes, sir. He is a member of the Association which I represent and he is also a member of the Independent Association. [923]

* * * *

Mr. Walker: Or a different concern. This is a copy of the so-called statement of policy, which you had typed, and, therefore, I assume you will stipulate it is a correct copy.

Mr. Katz: Yes.

Mr. Walker: I would like to offer it in evidence.

The Court: Yes.

* * * *

(Testimony of Eric Johnston.)

DEFENDANT'S EXHIBIT I

STATEMENT OF POLICY ADOPTED AT WALDORF-ASTORIA HOTEL MEETING ON NOVEMBER 26, 1947, BY MOTION PIC- TURE PRODUCERS, INCLUDING LOEW'S INCORPORATED

Members of the Association of Motion Picture Producers deplore the action of the ten Hollywood men who have been cited for contempt by the House of Representatives. We do not desire to prejudge their legal rights, but their actions have been a disservice to their employers and have impaired their usefulness to the industry.

We will forthwith discharge or suspend without compensation those in our employ, and we will not re-employ any of the ten until such time as he is acquitted or has purged himself of contempt and declares under oath that he is not a Communist.

On the broader issue of alleged subversive and disloyal elements in Hollywood, our members are likewise prepared to take positive action.

We will not knowingly employ a Communist or a member of any party or group which advocates the overthrow of the government of the United States by force or by any illegal or unconstitutional methods.

In pursuing this policy, we are not going to be swayed by hysteria or intimidation from any source. We are frank to recognize that such a policy involves dangers and risks. There is the danger of hurting innocent people. There is the risk of creating

(Testimony of Eric Johnston.)

an atmosphere of fear. Creative work at its best cannot be carried on in an atmosphere of fear. We will guard against this danger, this risk, this fear.

To this end we will invite the Hollywood talent guilds to work with us to eliminate any subversives; to protect the innocent; and to safeguard free speech and a free screen wherever threatened.

The absence of a national policy, established by Congress, with respect to the employment of Communists in private industry makes our task difficult. Ours is a nation of laws. We request Congress to enact legislation to assist American industry to rid itself of subversive, disloyal elements.

Nothing subversive or un-American has appeared on the screen. Nor can any number of Hollywood investigations obscure the patriotic services of the 30,000 loyal Americans employed in Hollywood who have given our government invaluable aid in war and peace.

Q. (By Mr. Walker): Mr. Johnston, you have referred to the resolution, as you called it, I believe, the statement of policy, which was adopted at this Waldorf-Astoria meeting. I hand you a document marked Defendant's Exhibit I and ask you to look at it sufficiently to assure yourself that it is a copy of the policy statement. [925]

A. Yes, sir. Do you want me to read it?

The Court: Oh, no; merely identify it.

A. Yes, sir.

Q. (By Mr. Walker): I understand you to say that it is?

A. It is; yes, sir.

(Testimony of Eric Johnston.)

Q. Now, I direct your particular attention to one provision of that agreement or of that statement of policy, which is as follows—after referring to the policy to be put into effect with reference to what are here designated as the 10, the statement proceeds, “On the overall issue of alleged subversive and disloyal elements in Hollywood, our members are, likewise, prepared to take positive action. We will not knowingly employ a Communist or a member of any party or group which advocates the overthrow of the government of the United States by force or by any illegal or unconstitutional methods.” Do you recall that provision? A. Yes, sir.

Q. Was that the subject of any discussion in this meeting? A. Yes.

Mr. Katz: We object to that upon the ground it has already been asked and answered.

The Court: Yes. The objection is sustained.

Mr. Walker: Your Honor, I wish to call the witness' [926] particular attention to it and refresh his recollection by showing him the provision and ask him to relate any part of the discussion, which he has not related, that deals with that.

The Court: I do not think it is material and we are going into a discussion that is absolutely foreign. We are not interested in any special discussion of what one man said to the other. For the purpose of this examination, you have sufficiently gone into what was said, without calling the witness' attention to particular wording and asking him to explain what was done and what it means. I will sustain the objection.

(Testimony of Eric Johnston.)

Mr. Walker: That completes my examination.

* * * *

[927]

Cross-Examination

By Mr. Kenny:

Q. Mr. Johnston, you are the president of the Eastern and Western Motion Association?

A. Yes, Mr. Kenny.

Q. And ever since then you have been a spokesman for the industry at all times in speeches that you have made? A. Yes, sir.

Mr. Walker: I object to that on the ground that it calls for a conclusion.

The Court: Objection overruled. We know what he is, now. There is no question of any mystery about it.

Q. (By Mr. Kenny): Loew's, Incorporated, is a member of both of the organizations, is it not?

A. Yes, sir.

Q. And former Governor McNutt is the attorney for your organization?

A. No. He was attorney only during these House Un-American Activities Committee hearings.

Q. He was only your attorney then?

A. He was only employed——

Q. (By the Court): He was specially employed?

A. He was specially employed for the purpose.

Q. (By Mr. Kenny): He was not at the meeting in New York, when Mr. Byrnes was there?

A. Mr. Byrnes. I do not think Mr. McNutt was present. I am not positive of that, Mr. Kenny.

(Testimony of Eric Johnston.)

The Court: At either meeting, or at the meeting at which the resolution was adopted?

The Witness: At either meeting. I don't think he was present. I am not positive. I do not recall him.

Q. (By Mr. Kenny): Although he is not your attorney now, you have never publicly disavowed any of the statements that Governor McNutt publicly made during the hearing between October 20th and 30th of last year, isn't that right?

The Court: You mean Mr. Johnston or his organization?

Mr. Kenny: Mr. Johnston or his organization.

A. I don't recall that I have, Mr. Kenny.

Q. (By Mr. Kenny): Well, has your organization ever disavowed any of those statements?

A. Not to my knowledge.

Q. And when you testified before the Committee, Mr. Johnston, on October 27th, I believe you said you read a prepared statement, didn't you?

A. Yes, sir.

Q. And you knew at that time the Committee did not permit all witnesses that privilege, did you not know that?

A. Yes.

Q. And as a matter of fact, you had publicly protested against this practice of the Committee of letting some witnesses [930] read statements and others not, had you not?

A. No, sir. I publicly protested against the general attitude of the Committee. I do not recall that I publicly protested about statements.

(Testimony of Eric Johnston.)

Q. You recall an advertisement which was published with your signature? A. I do.

Q. On October 27th?

A. I do, yes, sir.

Q. And you stated in that advertisement, did you not, "The Committee can accept or reject explanatory statements for the record?"

A. That is right.

Q. And that in this advertisement you urged the Congress to initiate reforms, did you not?

A. That is right.

Q. And was that not one of the reforms you urged them to initiate?

A. I urged them that it was one of the reforms so as to have the procedure more fair and uniform.

Q. That is right. And you know that Mr. Cole was not permitted to read his statement when he appeared as a witness?

A. I heard that he did not read it.

Q. And you know that he was not allowed to read his statement, isn't that right. [931]

A. I wasn't present at the hearing at which Mr. Cole testified.

Q. Didn't these people who were representing you tell you that?

A. Well, it was a question of whether he was allowed to read it or whether he would not ask some questions. I am not prepared to say, Mr. Kenny.

Q. You don't know yourself about what transpired with Mr. Cole?

(Testimony of Eric Johnston.)

The Court: Well, we know what took place and the jury know it, because counsel and I have heard the oral versions and the phonographic version and then we had the photographic version. So the fact remains, he was not allowed to make it. We know that. Nobody disputes that. The question is, do you know now.

The Witness: I knew that he did not make his statement.

Q. (By the Court): You did not know he was forbidden to make it?

A. I did not know that specifically.

Q. (By the Court): After Mr. Thomas examined him?

The Witness: I believe, your Honor—I believe that many of them—I believe the chairman——

Mr. Kenny: Mr. Johnston, I am asking you about Mr. Cole.

A. All right. I believe, Mr. Chairman, that Mr. Thomas claimed that the statement was extraneous and was not answering [932] the question. Is that right?

Q. (By Mr. Kenny): Were you there?

A. No. I was not there.

Q. (By the Court): Have you ever read Mr. Cole's testimony?

A. I have not read Mr. Cole's statement.

The Court: All right. That is all Mr. Johnston can tell us. He had an idea that the statement wasn't read. He did not know whether he was

(Testimony of Eric Johnston.)

prohibited from reading it nor upon what theory.

The Witness: That is right.

Mr. Walker: He said he didn't hear Mr. Cole's statements.

The Court: Well, he didn't hear Mr. Cole's statement. Some question arose about it and he did not read it. Go on. [933]

Q. (By Mr. Kenny): You know this advertisement that was referred to was published before Mr. Cole ever took the witness stand, is that right?

A. That advertisement was published before the committee hearing started, I believe.

Q. I call your attention to the copy that we have. I notice that its date is October 27th, the same date you testified?

A. Maybe that is right, then. There may have been another advertisement but this is the one to which I have reference.

The Court: Yes, it preceded the testimony of Cole. Whether it preceded the testimony of others, that is not material.

The Witness: That is unimportant.

Q. (By Mr. Kenny): Now, in this November 26th statement, the Waldorf-Astoria statement of policy which has now been introduced as Defendant's Exhibit I, I believed, you made the statement in there, did you not, "There is the danger of hurting innocent people?"

A. That is right.

Q. And on October 27th, when you testified be-

(Testimony of Eric Johnston.)

fore the committee, didn't you say this: "Most of us in America are just little people, and loose charges can hurt little people. They take away everything a man has—his livelihood, [934] his reputation and his personal dignity?" Didn't you say that?

A. That is right, and that was referring——

Q. I am just asking you whether you said that.

A. Yes, that is right.

The Court: Just a moment. Now, you remember you are not before a committee. You are in this court and Mr. Johnston has the same privilege of explaining, now, that he has given you an answer, he has the privilege of explaining.

Mr. Kenny: I was misled by Mr. Johnston. He referred to you as "Mr. Chairman."

The Witness: No, I did not. I did not. I referred to you as his Honor.

The Court: No. I think you specified "Mr. Chairman." I did not know whether you thought you were before the committee or not. It is all right with me. I am the presiding officer of this court. In fact, I am probably at a disadvantage, I haven't the unlimited powers which a chairman of the committee has.

Mr. Katz: Nor the gavel.

The Court: While I am limited by law to what I have to say, I try to observe that.

The Witness: There is no confusion in my mind, your Honor, no confusion of authority.

The Court: Thank you very much. You have

(Testimony of Eric Johnston.)

not finished [935] your answer. You wanted to amplify your answer, Mr. Johnston. I will protect your constitutional rights around here.

The Witness: All right. Thank you.

The Court: All right.

The Witness: I wanted to state that that referred specifically to witnesses getting on the stand and accusing others of being Communists, without any privilege on the part of the people so accused of defending themselves.

Q. (By Mr. Kenny): That is, without cross-examination? A. Right.

Q. And as a matter of fact, you said in this advertisement that a congressional committee is not a court? [936]

* * * *

Q. (By Mr. Kenny): The language that I have reference to is at the bottom of the first column where you say "that a committee is neither a prosecutor or a court;" you said that in that advertisement of the 27th, did you not?

A. Yes, sir.

Q. And you also said at that same time, in that same [937] ad, that court procedures and protections of witnesses—I will read you the exact language.

The Witness: Where is that?

Mr. Kenny: This would be the second paragraph from the top, in the third column. "These protections and safeguards are denied or short-circuited in Congressional inquiries."

(Testimony of Eric Johnston.)

A. That is correct. It is in there.

Q. And you haven't changed your views on that? A. No, sir. Not at all.

Q. Did you make an address on the 19th of November, that is about four or five days before the Waldorf-Astoria meeting?

A. Yes. I addressed what is known as the Picture Pioneers, the people who have been in the industry more than 25 years. [938]

Q. (By Mr. Kenny): And I will ask you if you didn't say this—I found your speech in the Congressional Record, Mr. Johnston.

* * * *

Q. (By Mr. Kenny): And this is the language I call your attention to and I ask you if you were not speaking of Mr. Cole and the other nine unfriendly witnesses:

“They may have had a right to challenge the Committee as they did. I don't know. I am not pre-judging. That is something to be tested in the courts. We need a determination on that score in the traditional American way, and after that there can be no argument about it.”

Did you say that, Mr. Johnston? [940]

* * * *

The Witness: Thank you.

“They may have had a right to challenge the Committee as they did.”

That is right.

Q. (By Mr. Kenny): You said that?

A. I said that, yes.

(Testimony of Eric Johnston.)

The Court: Now, take a pencil and mark it so you will have something to find that by.

Q. (By Mr. Kenny): And you also said, "That is something to be tested in the courts," didn't you? A. That is right.

Q. Now, you said, Mr. Johnston, to go back to this advertisement, you said in that, and this is in the middle column, Mr. Johnston, after the three stars—— A. Yes.

Q. —— "One of the most precious heritages of our civilization is the concept that a man is innocent until he is proved guilty. This concept is so dear to us that we say it is better for twelve guilty men to escape than for one innocent man to suffer."

A. That is accurate.

Q. And you still believe that? [941]

A. Of course.

Q. And you knew, did you not, on November 26, 1947, or November 24th to 26th, 1947, that is the time of the New York meeting, you knew at that time that no charges had ever been filed in any court against Lester Cole as a result of his appearance before the Un-American Activities Committee?

A. Well, I think he was then in contempt of Congress, Mr. Kenny.

Q. You know that no charges had been filed against him in any court, at that time?

A. On the 26th of November?

Q. That is right?

A. Well, I am not sure. It was approximately

(Testimony of Eric Johnston.)

at that time when he was cited for contempt of Congress.

The Court: Well, he is not referring to the citation by the Congress, by the Committee. He is referring to a prosecution because, you understand that the Congress merely decided—the Committee merely decided to cite him for contempt and then report the matter to the United States Attorney.

The Witness: Oh, I see.

The Court: And if any prosecution is instituted, it is instituted by the United States Attorney, and that is what he is referring to. The Congress, the Committee, thank God, doesn't sit as judge of anybody, whether anybody is guilty of [942] contempt in front of them. The court does that.

The Witness: As to him.

The Court: That is all he asks.

Q. (By Mr. Kenny): Didn't you make any effort to find out whether charges had been filed in a court against Mr. Cole, before that New York meeting?

A. That had nothing to do, Mr. Kenny, with the abrogation of the contract.

Q. I am just asking you whether you made any effort to find out whether any charge had been filed in any court against Mr. Cole.

A. Well, if he was cited for contempt of Congress, I assume that the charges would be filed in court. In fact, they have been.

Mr. Kenny: I submit that is not responsive to

(Testimony of Eric Johnston.)

the question, your Honor, and I ask that the question be read.

The Court: Well, he has answered. He assumed. He did not know. He assumed they would have, but you did not know whether an actual prosecution had been instituted at the time?

A. No, sir, I did not.

The Court: All right.

Q. (By Mr. Kenny): You knew that at that time no attempt had ever been made to prove any charges against Mr. Cole in any court of this land as a result of his appearance [943] before the Un-American Activities Committee?

A. I presume that is correct.

Q. And you know that to this day Mr. Cole has never been even put on trial for any charges in connection with the matter?

Mr. Selvin: Now, just a moment, please. I will not object to that question, if there will be no objections either on redirect or as a part of our own case to evidence showing just what the situation is in that regard. Otherwise we object to it.

The Court: No. I am going to sustain the objection. Otherwise we will have to go into outside matters to explain why, and I don't want that matter to be gone into, because neither the jury nor I are interested in that. Objection sustained.

Q. (By Mr. Kenny): You are familiar with the pictures made by Loew's and other companies which were written by **Mr. Lester Cole**?

A. No, I am not familiar with them, Mr. Kenny.

(Testimony of Eric Johnston.)

Q. Are you familiar with any pictures written by Mr. Lester Cole?

A. I do not recall any by name, no, sir.

Q. Has it ever come to your attention that any picture written by Mr. Cole was un-American, subversive or detrimental to American interests, in any way? [944]

A. Mr. Kenny, I have always maintained that the screen has never had any subversive material on it, and, of course, that would include Mr. Cole who has written for it.

Q. Now, on October 27th, when you appeared before—I wonder if Mr. Johnston has also been supplied with a copy of the——

A. I have, yes, sir. I have it.

The Court: I am the only one who has been left out.

The Witness: You and I will look on together here.

The Court: You are a younger man than I am. Your eyesight is better than mine. All right. Thank you. I will read this.

Mr. Walker: It has been recovered from the reporter and the clerk and is now at your service.

The Court: I will read it to him. It enables me to pass, Mr. Kenny, on the objections, if I have the document before me. Go ahead.

The Witness: I think it begins, your Honor, on page 305. That is the beginning of the testimony.

Mr. Kenny: Well, I am calling your attention at this time, so that we may present the matter in

(Testimony of Eric Johnston.)

a logical sequence, first to page 313 of your testimony and this is the language. Well, it is the first language in large type. I believe that is your language, is it not, Mr. Johnston?

A. Yes, sir. [945]

Q. And you said, "Mr. Chairman, the Association of Motion Picture Producers at Los Angeles adopted the first and the third. They did not adopt the second." A. That is right.

Q. Now, you were referring at that time to the three-point program, isn't that correct?

A. I was referring to a three-point program which I had presented to the Motion Picture Producers Association in Hollywood the June prior.

Q. That is correct, and you went on to say that you had presented it, they "adopted the first and the third," but that the Motion Picture Producers did not adopt the second, that is right?

A. That is right, sir.

Q. And you went on to say, "The second is the agreement not to employ proven Communists in Hollywood on jobs where they would be in a position to influence the screen." A. Right.

Q. "They did not adopt that for several, what they thought, were very good reasons." Then there was an interruption by Mr. Stripling, you had asked to complete your statement and you went on to say, as follows, did you not:

"The first reason assigned was that for us to join together to refuse to hire someone or some people would be a potential conspiracy."

(Testimony of Eric Johnston.)

You said that? [946]

A. Yes, sir.

Q. Or is that what the Producers said?

A. No. That is right here.

Q. "and our legal counsel advised against it."

A. That is correct.

Q. "Second," I think you said that, "who was going to prove whether a man was a Communist or not?" And then you said, did you not, Mr. Johnston, "Was it going to be by due process of law in the traditional American manner, or was it to be arrogated to some committee in Hollywood to say that he was a Communist, or some producer, and if they said he was a Communist they might at some future time find he was a Republican, a Democrat or a Socialist, and not hire him."

You said that, too, didn't you?

A. That is right. [947]

Q. "In other words, who is going to prove that this man was a Communist? And under what methods?"

A. Right.

Q. "They did not adopt that for several, what it was the duty of Congress to determine two things: First, was a Communist an agent of a foreign government—as I believe he is—and/or second, is he attempting to overthrow our government by unconstitutional means. Therefore, it was up to Congress to make these two determinations before we could take action." You said that, didn't you, Mr. Johnston?

A. That is right. That is right.

(Testimony of Eric Johnston.)

Q. You have stated that you are in constant contact with Congress? A. That is right.

Q. And Congress has never taken any such action, has it? A. No, sir.

Q. And you went on to say this, "I must confess they"—That means the producers, doesn't it?

A. That is right.

Q. ——"they convinced me they were right on all three points, Mr. Chairman, and that is the reason they did not attempt No. 2."

A. That is correct. [948]

Q. That was your testimony on October 27th?

A. That is correct.

Q. Now, in your statement of policy, that is we are going back to the November 26th statement, I think it is Exhibit I, you said in there, "We are frank to recognize that such a policy involves dangers and risks." Isn't that correct?

A. That is the statement, yes. I did not say it. This was the statement of the group.

Q. Of everybody? A. Yes.

Q. I believe you were the spokesman, though?

A. No.

Q. You presented it?

A. No. Mr. Byrnes prepared it. I did not.

Q. You had nothing to do with that statement at all, that is your testimony, isn't it?

A. I had the same amount to do that anyone else had to do with the statement. I did not write the statement.

Q. You haven't disavowed the statement?

(Testimony of Eric Johnston.)

A. Oh, no, not at all.

Q. And that statement said that you were frank to recognize that such a policy involved dangers and risks, isn't that right?

A. That is right. [949]

Q. You testified that Mr. Mannix was one of the representatives of Loew's at that meeting, isn't that right?

A. Yes.

Q. Now Mr. Mannix has testified in his deposition here, page 83, if you want it, that at the New York meeting there was a discussion of the risk that the industry would have to take if it adopted this policy and that the risk involved was one of legal liability. Now, such a discussion did take place?

A. That is right.

Q. As to what the legal liability was to be, and I believe you testified that Mr. Byrnes said that there was a possibility of legal liability, is that right, but that you would have to take the risk in adopting that policy?

A. Yes.

Q. Now, Mr. Mayer was also at the meeting, you testified?

A. Yes, sir.

Q. Do you recall Mr. Mayer saying at that meeting in New York there at the Waldorf-Astoria that the industry ought to turn the tables and wait until Congress passed a law so that the industry would know what it could do legally and how to do it?

A. I don't recall if Mr. Mayer made that statement at the Waldorf meeting. He may have. I do not recall that [950] he did. He has made the

(Testimony of Eric Johnston.)

statement several other times, however, and I have heard him make it so I am quite sure that that was his position at one time.

Q. And Mr. Mannix I think told us that Mr. Mayer spoke at the Waldorf meeting for about 15 minutes. Do you recall him speaking for about 15 minutes?

A. Yes, I think all of that.

Q. And didn't he say during that time something to the effect that it was a shame that the industry should be put in this position, that it was the duty of the Congress and that Congress should pass a law?

A. Well, that statement might have been made. I just do not recall it. It was Mr. Mayer's position I think quite consistently. [951]

* * * *

Q. You heard him make a statement to that general effect at that meeting, did you not? [952]

A. I am not sure he made it at that meeting, but he did make a statement to that effect at some other meeting.

Q. Well, didn't he say anything like that in that 15 minutes? You said that this had always been his position.

A. Well, Mr. Mayer's statement at the meeting was a statement, as nearly as I can recall, Mr. Kenny, in which he felt that these 10 men had done a great disfavor to the industry, that they should be discharged, that there shouldn't be any compromising with the action, that we should take

(Testimony of Eric Johnston.)

action immediately; why we waited so long. I don't recall him making the statement which you say there, which I think is quite a different statement than what he made at the Waldorf meeting.

Q. You don't recall him making it?

The Court: Well, he has answered it several times, Mr. Kenny.

Q. (By Mr. Kenny): Mr. Johnston, I think you testified about some incident at Chapel Hill.

A. North Carolina.

Q. Now, that wasn't concerning any picture that was made by Mr. Cole, was it?

A. No, I do not think so, Mr. Kenny. It was about another picture.

Q. As a matter of fact, it was a picture in which the star was Miss Katherine Hepburn, is that right? [953]

A. That is right.

Q. And Miss Katherine Hepburn is still employed with Loew's, Incorporated, so far as you know, is she not?

A. Yes, so far as I know.

Q. And Miss Hepburn's name was mentioned in connection with some political activity that she had undertaken, is that it?

A. As I understood it, it was a general feeling that I think Miss Hepburn's name was mentioned, perhaps, it was mentioned in the Congressional hearing; I am not sure.

The Court: He is talking about the meeting.

Q. (By Mr. Kenny): I am wondering what was said at the meeting about Miss Hepburn.

(Testimony of Eric Johnston.)

A. Oh, in the Waldorf meeting?

Q. Yes.

A. Oh, I don't know that her name was mentioned?

A. The picture was mentioned, yes. I mentioned it as rendering a rising public sentiment against Communists, against employing those who they thought were Communists.

Q. (By Mr. Kenny): And that you thought Miss Hepburn was a Communist?

A. I said there was a tendency to boycott pictures that they felt were made by Communists or whom they felt were Communists, and Miss Hepburn had it, then, at the present time [954] that someone had indicated that she was a Communist and that there was some intention to picket that picture because of that. It was simply recognizing a tendency, Mr. Kenny, to boycott pictures in which the public thought Communists participated.

Q. And you said at that meeting you thought Miss Hepburn was a Communist?

A. No one said at that meeting—I mentioned that a picture was being boycotted at Chapel Hill.

Q. Do you recall anything else said either about Miss Hepburn or that particular Chapel Hill picketing?

A. I do not recall anything, Mr. Kenny.

Q. All right. Mr. Mayer also said that the name of Mr. Charles Chaplin was mentioned and some protest against that picture of his was mentioned at that meeting. Do you recall that?

(Testimony of Eric Johnston.)

A. No, I do not.

Q. You don't recall the name of Mr. Chaplin being mentioned at any time?

A. No, I do not.

Q. Do you recall the names of any other prominent movie stars being mentioned, that is, names of prominent movie stars who were involved in any kind of public relation difficulties or legal difficulties?

A. Undoubtedly there were some mentioned, Mr. Kenny. I [954-A] do not recall the names, if they were, and I presume that they were. [955]

* * * *

Q. (By Mr. Kenny): Do you recall either hearing or having it brought to your attention, Chairman Thomas' statement, closing statement at the time of these hearings, when they closed on October 30th, Mr. Johnston? Would you mind turning to that on page 522?

The Witness: 522?

Mr. Kenny: Yes. Do you recall he said that that was the first phase of the committee's investigation of Communism in the motion picture industry?

A. Yes, I recall that.

Q. And he said, "The Chair stated earlier in the hearing he would present the records of 79 prominent people associated with the motion picture industry who were members of the Communist Party or who had records of Communist affiliations. We have had before us 11 of these individuals. There are 68 to go."

(Testimony of Eric Johnston.)

Do you remember that?

A. Yes, I remember that, something to that effect.

Q. And you brought that to the attention of the producers at their meeting, did you not, at the Waldorf-Astoria Hotel?

A. No, Mr. Kenny, I did not, because in my opinion I never felt that the Communist phase would again be reopened.

Mr. Kenny: Now—— [956]

Mr. Walker: He should be allowed to explain what he felt.

The Court: Explain your answer.

The Witness: I never felt that the Communist investigation of Hollywood would be re-opened and I so publicly stated.

Mr. Kenny: I don't know whether I have a record of that public statement here or not. I have many of your statements, Mr. Johnston. I will look it up.

The Witness: And certainly I wouldn't call that to their attention, because I didn't believe it. I had other information to believe that it would not be re-opened and it has not been re-opened.

Q. Did Mr. Thomas give you that information?

A. No. He certainly did not.

Q. Was this a public source of information?

A. No.

The Court: I will sustain the objection. It may interest you, but it doesn't interest me or the

(Testimony of Eric Johnston.)

jury. You have asked a specific question and he has answered it.

Mr. Kenny: Yes.

Q. Mr. Mayer said at the meeting that there was talk about avoiding federal censorship, is that right?

A. That is right. That is one of the things that was mentioned. [957]

Q. And Mr. Mannix also said that there was similar talk?

A. I think I mentioned it to them, that there had been a ban on newspapers urging censorship of the 10 before Congress.

Q. (By Mr. Kenny): You also suggested that there be legislation against the industry, didn't you?

A. That is right, I did, Mr. Kenny.

* * * *

Q. Mr. Johnston, you mentioned at that meeting up in Governor McNutt's room on the eve of the committee hearing, on October 19th——

A. Yes, sir.

Q. ——and who was this producer whose testimony you had been reading and were discussing before we came in.

A. I hadn't been reading any producer's testimony before you came in. I arrived just a moment before you did, and I hadn't been reading any producer's testimony.

Q. And you recall your testimony that there had been some embarrassment, whether to you or to

(Testimony of Eric Johnston.)

the hearings or your attitude, any way the subject of embarrassment about some previous producer's statement?

A. It is not my recollection. I never made any such [958] statement. [959]

* * * *

Q. (By Mr. Kenny): You have mentioned a conversation as the meeting was breaking up about the question of a rumor that there had been——

A. Yes, sir.

Q. ——that there might be an agreement for a blacklist among the industry?

A. Yes, sir. I think you asked me that question, if I am not mistaken, Mr. Kenny.

Q. And you remember saying, "No," that there never would be a blacklist as long as you were president of this association?

A. I said that there had been no deal or arrangement made with the House Un-American Activities Committee. I don't remember the word blacklist was used, but I made no agreement at any time, nor would I ever make an agreement with the congressional committee concerning the employment of anyone in Hollywood.

Q. Did you say or did you not say that the industry itself would never adopt a blacklist?

A. Well, I told you what I thought I said, Mr. Kenny, and that was that I had made no deal with the House Un-American Activities Committee, nor would I make any such deal. That is what I think I said, Mr. Kenny.

(Testimony of Eric Johnston.)

Q. Do you remember this question or this statement by you and a statement by Mr. Bartley Crum, that you said, [960] "As long as I am president of this association there never will be a blacklist," and Mr. Bartley Crum said, "Thank you, Eric, I knew that such rumor would be untrue." Don't you remember that?

A. I do not recall the word blacklist, Mr. Kenny. I recall—I think you are asking me and I think I have stated it just as I recall it: It was just as the meeting was breaking up, as I remember it, Mr. Kenny, and I think you asked me—as a matter of fact, there was some confusion in the room and some of the people even were beginning to leave, and you asked me, the query was translated if I had made an agreement with this committee not to employ certain people, that maybe the word blacklist was used, and I said, no, I never made any such agreement nor would I do so. I remember Mr. Crum, who was an old friend of mine, thanking me as I went out of the room, for the attitude we had taken, and so forth. I think he may have said that he knew I wouldn't make any such agreement with the congressional committee, but I don't recall the exact words.

Q. (By Mr. Kenny): One thing you are sure about is that you are not going in for a blacklist?

A. Of course, not in general.

Q. But no documents of any kind were handed to you? A. Not to my knowledge.

Q. Then, tell us how do you know that plaintiff's [961] Exhibit 4 was not produced?

(Testimony of Eric Johnston.)

A. What is plaintiff's Exhibit 4? I don't know what plaintiff's Exhibit 4 is.

Q. Plaintiff's Exhibit 4 is the one you testified you did not see.

A. No, I did not examine it or read it. I think there was some paper present, but it was not handed to me.

Q. No paper was handed to you?

A. Not to my knowledge.

Q. Then you do not know whether this was presented there at the meeting or not?

A. I do not know.

The Court: You refer to the telegram?

Mr. Kenny: I am referring to Exhibit 4.

The Court: To the telegram.

Mr. Kenny: To a telegram. [962]

* * * *

(Whereupon the following proceedings were had before the court, in open court, without the hearing of the jury:)

Mr. Walker: We are going to make an offer of proof we have with reference to expert testimony in regard to the purposes of the Communist Party. At the same time, we are going to make an offer of proof with a lay witness on the stand as to public opinion, with reference to what the Communist Party stands for.

* * * *

Mr. Selvin: We have certain other offers in addition to those that Mr. Walker has suggested we should make, all of which I am quite certain, in view of the

extensive discussions we have had, will not result in any evidence being admitted. I was [963-A] going to suggest that when we adjourn today, that the jury be instructed to return at 11:00 o'clock or at 2:00 o'clock, tomorrow, whenever it is, and we will then be in position, tomorrow, more certainly at 2:00 o'clock than at 11:00 o'clock, to know whether or not there will be any further evidence from the defendant.

The Court: I gather, then, that excluding the documentary evidence, if I rule against this evidence, and if Mr. Rubin does not come, that concludes all of your case?

Mr. Selvin: That is right, with these offers that we have now, we thought we might spend the time in the morning getting rid of that situation. By that time we hope that we will know from Mr. Rubin whether or not he will be able to come here, and in the meantime the jury could be instructed to return at 2:00 o'clock. [963-B]

* * * *

The Court: Then, I think this, so far as the jury is concerned, we can tell them to come at 11:00 o'clock and then we will take the hour.

I do not think, in view of the long arguments that we have had, it will take any additional extensive argument, and I say now that I am satisfied, more than ever, that the balance of the pictures cannot be shown and that the editorials cannot be shown.

There is one additional thought, and I am not ruling definitely on it. I am giving my additional thought to it, the one additional thought:

The only instance in law where, if the sources of

information are cited, you may also give the nature of the information, is in mitigation of damages, and where your intent is involved, in malicious prosecution—let us get away from libel—for instance, in malicious prosecution, you believe that probable cause exists for an issue, and in that case you can show that you actually went to the city attorney's office or to the city prosecutor's office——

Mr. Kenny: Yes.

The Court:——and laid all the facts before him and [963-E] what advice he gave you.

Mr. Kenny: Yes.

The Court (Continuing): And use that, and that goes to the jury on two propositions, first, did you make a full disclosure and if so, if you did, then you are entitled to the benefit of the instruction that if you made a full disclosure and acted upon that matter, then probable cause existed.

In the law of libel, when you seek mitigation of damages and when we discover matters which are not an ingredient of civil cause of libel but where they are pleading punitive damages and where you don't prove malice, there, also you may give the source of information.

But in this particular case, there is no such issue and, while the books say that in designating the question there must be good faith, it merely refers to the willfulness——

Mr. Kenny: Yes.

The Court: ——with which the act is done, and that is the same as willfulness on the part of the plaintiff in doing the act, not in foreseeing the con-

sequences. That is where counsel and I disagree. Counsel for the plaintiff think that if he felt in good faith, that it wouldn't have that effect. Well, that isn't as I understand it.

The willfulness—and I will give the definition from the May case—the willfulness which is involved here is [963-F] merely the knowledge that he is doing it knowing what may follow.

And for those reasons, also, I believe that the testimony of Mr. Johnston that he saw the editorials would not warrant our introducing the editorials, and that the way the testimony stands now, or even implemented by further testimony on the part of Mr. Benjamin as to the report he made of the pictures I do not believe would warrant introducing what the other nine men did, and I do not believe that the testimony which was brought out on the part of the plaintiff in reporting to the plaintiff to the effect that there was some consultation about the matter would warrant you in introducing what the other persons did, either by direct testimony or by pictures.

I have allowed you to introduce, to go into as much detail, and you may go into further detail as to what took place at that meeting, but the mere fact that the names were referred to would not in themselves warrant the introduction of the nine pictures. Now, that is my thought at the present time. I may change my mind in the morning, but I am very positive about—in other words let me say this frankly: You may put this down.

It is not my duty to advise you, but just as I have indicated to them, that possibly some of this testi-

mony might have been kept out, if they hadn't taken the burden of showing, of trying to show in advance that that wasn't the real reason. [963-G] I believe that your position—you see, the jurors are to determine whether the conduct had this effect, which I will propound in three questions——

Mr. Selvin: I understand.

The Court: ——your position will be weakened, you see, if you depart from that and offer evidence. [963-H]

I am also of the view that it is not a question of proof whether calling a person a Communist subjects one to ridicule and obloquy, and I am going to state to the jury, not in the form which I gave it yesterday, that under the law of California it is libelous to call a man a Communist, because I take that one decision of the District to be binding on me and even if there are two contradictory cases, I have the right to choose the one which in my opinion is more likely to be sustained, and I think that one is more likely to be sustained, especially when rendered by a court to which one of our circuit judges belongs; I will state at the same time, supplementing with the instruction that it is lawful to be a Communist, and then also that he is not charged with being a Communist and, in other words, give a composite picture of the whole issue, bringing home to them that proposition that this question for them to decide is not to decide whether he is a Communist or that he is not a Communist, but whether by declining to answer the question or the questions he subjected himself to ridicule and obloquy. In view of that, in view of my atti-

tude toward the law, which may be assumed to be positive, they may have objections, but I don't think they will change my mind, because I have lived with this thing for three weeks and my mind is still on it. Upon that assumption, no evidence will be admissible by anybody as to what the Communist Party stands for, as to whether calling a man a Communist [963-I] has a tendency to subject one to obloquy.

And since I have been talking to you I have gone through the entire chapter on libel in *Corpus Juris Secundum* to see if there is something that has come up in the law in the last few years that I might not have come in contact with, and I believe that what I have said relating to the law of libel and as to the method of proving damages and the effect of it is still good law, in other words, Yankwich on libel is still good law to me. [963-J]

* * * *

Mr. Selvin: Then, is it my understanding, your Honor, that the case will not be held open until Monday for Mr. Rubin, in the event he is able to come?

The Court: No, no. I am assuming that he isn't able to come.

Mr. Selvin: Well, we won't know until the noon hour.

The Court: I am sorry. No. I am telling you that if he isn't.

Mr. Selvin: Well, I misunderstood you.

The Court: If he is coming, of course I don't like losing two days.

Mr. Selvin: Maybe we can save those two days, your Honor, if Mr. Rubin should tell us that he or

Metro acted because of the conduct of these ten men. Would that make any difference in the rulings which you have indicated you are going to make?

The Court: No. I would allow that statement to go in, but I would not allow the jury to determine what the conduct [963-K] was.

Mr. Selvin: You would not allow the testimony of the conduct of the ten?

The Court: Not other than what is already in.

Mr. Walker: Your Honor, you would not allow the showing of the pictures?

The Court: I wouldn't allow the showing of the pictures of the other nine men.

Mr. Selvin: Or the reading of the transcript?

The Court: No.

Mr. Selvin: Then, there would be no purpose in having Mr. Rubin here. We only wanted to bring him to lay the foundation to make the pictures admissible.

The Court: I will allow him to go as strongly as he can and testify as to what he knew, just as I allowed Mr. Johnston to give his opinions and impressions and everything else. I will allow him to do that. But I do not believe that that brings in the material which he—unless you intend to show that the pictures were actually run at that particular meeting.

Mr. Selvin: Then we don't need him because what he knew would simply be cumulative of Mr. Johnston's testimony, because he heard what Mr. Johnston said.

The Court: Well, all right.

Mr. Walker: I think we ought to have it clear. We want [963-L] to make our offer. [963-M]

* * * *

The Court: Let the record show that, pursuant to agreement with counsel, the proceedings to follow are had outside of the presence of the jury, it being agreed that certain offers of proof will be made outside of the presence of the jury so as to give both counsel and the court greater freedom of discussion and in order that, in case some of the matters to which the offers relate are never brought before the jury, their contents will be withheld from them. Proceed, Mr. Selvin.

Mr. Selvin: At this time, may it please the court, we would offer to prove by the witness Max Eastman that he is and for many years last past has been a student of the literature and science of Marxism and Communism; that he has for many years been an editor of publications devoted to social and economic problems; has been the author of a great many books on varying subjects, including Marxism and Communism, and that he has, for many years and particularly the last two or three years been a lecturer on social, economic and political problems, having lectured before many audiences in [969] various parts of the United States, audiences composed of various classes of the population. We will, then, ask him, based upon his experience and knowledge, if he has any opinion as to the state of public opinion or attitude in this country towards the Communist Party and its members, and ask him if he has any opinion as to whether or not the Communist Party

in this country advocates the overthrow of our form of government by force and violence, and whether or not he has an opinion as to whether the Communist Party in this country is, in fact, an agent of a foreign power; to all of which questions we offer to show that he would answer in the affirmative and would give the grounds and reasons for his conclusions.

Unless the court thinks it is necessary, I have no desire to go into the details of the testimony. I just wanted to indicate the general nature of the testimony we propose to offer. I will say that the general subject of its admissibility has been discussed heretofore, I think, quite thoroughly and we have nothing to add by way of discussion, and I am merely making the offer at this time.

Mr. Katz: To which we object on the ground it is incompetent, irrelevant and immaterial. If this producer wanted to discharge Mr. Cole because it believed it could prove that he advocated the overthrow of the government by force and violence or that he was a Communist, it should have done so [970] and joined the issue. Knowing that it could not establish any such proof, it gave a notice in which it resorted completely to the terms of the morals clause. The morals clause refers specifically to an act of Mr. Cole before the House Committee on Un-American Activities and his acts and conduct there. That was the limit of the notice of suspension. And we object on the ground that it is an attempt to bring into this case extraneous matters.

The Court: In our discussions which we have had

outside of the hearing of the jury but on the record, and which have been transcribed, we have discussed the question as to whether Communism is an issue in this case at all. I stated, at the outset, on the motion for summary judgment made by the plaintiff at the beginning of the case that, in my opinion, Communism is not an issue as such; that the tenets of Communism are not an issue and that the question whether Mr. Cole was or was not a Communist is not an issue. Further study which I have made of the case confirms me in the position that I have taken in ruling up objections actually made or anticipatory objections, which, by agreement of counsel, were considered before the witness was actually sworn.

I have indicated to counsel that at this stage of the case, and unless some unusual situation should arise which would change my mind, I consider that the gist of the case and the only issue which the case presents is not whether Mr. [971] Cole, by being or not being a Communist, violated the morality clause, but whether his conduct before the Congress, not only in refusing to answer, because the notice is not based on that, but his entire conduct, was such as to bring him into hatred, contempt and ridicule that was shocking to the community and prejudiced the plaintiff's employer.

As I stated yesterday, if I were of the view that the matter was one purely of law, there would be nothing to submit to the jury and the declaration would have to be either for the plaintiff or the defendant, as I would determine, as a matter of law, in a libel case in which the publication was libelous

per se or not, without the aid of a jury, because it is the rule of California and the rule of the entire English-speaking world that, when words spoken by a person have a tendency to subject him to public ridicule, obloquy or contempt or injure him in his business or profession, they are libelous per se, and that the determination of the question is one for the court and the court cannot submit, in the case of a publication which has that effect, the question to the jury.

However, I am of the view that the question here is one which calls for a factual finding by the jury and it is my intention to submit a question along the lines suggested by splitting up the cause into three separate parts, the first part asking whether his conduct was such as to bring him into [972] public hatred, contempt or ridicule; second, whether the conduct was such as to tend to shock or offend the community; and, third, whether it was such as to prejudice the defendant. I have already indicated by my ruling on the evidence that I believe that the matter is not the subject of a certain line of proof. Yesterday, when I indicated that fact, counsel for the defendant indicated that they would forego introducing some 60 depositions from various patriotic groups, including groups of the American Legion, the Veterans of Foreign Wars and the like, which were to the effect that they, as a part of the community, were not only opposed to Communism but that they felt that the acts of Mr. Cole reflected upon the industry and so forth. I did it upon the theory stated, just as if we were dealing with the case of a

broken leg, where we would describe the leg that was broken and leave it to the jury to determine what general damages would be awarded. So in this case we are not dealing with a general conduct or a statement which says that a man disobeys an order or is late at work and that he should be discharged, nor is the act complained of in the notice of that character. If that were the case, there would be no chance for a definition. We would merely ask the jury whether, in their opinion, as a fact, the person charged with a particular violation was or was not late or committed some other specific act. We are dealing here with a clause that is couched in general terms [973] and with a notice that merely says that the particular conduct had that effect. Either the jury has a right to determine that or it has not. If it has a right to determine that, then it does not need the information which the testimony of Mr. Eastman would bring before them.

Mr. Eastman is a very well-known writer. I presume every literate man in the country knows of him. He has written articles ranging from *The Theory of Laughter*, being one of the few heroic men who, with the French philosopher Bergson, actually defined why people laugh. Whether he succeeded, I do not know. [974]

It also ranges to his editorship of the *New Masses*, Series No. 1. Any student of literature knows that. So that I am quite certain he could bring a lot of information to us and refer us to a lot of books. As a matter of fact, a lot of the books that he might refer to, dealing with the problem one way or the other,

you may find in the last issue of the Georgetown Law Journal, Volume 37, number one, where there is a leading article, a rather short article. Like counsel's brief, it covers 27 solidly printed pages, with some 58 footnotes, written by Leon R. Yankwich, and the title of which is Background of the American Bill of Rights. I don't think I cited Mr. Eastman but I cited about everybody else, including Lenin, and I cited all sorts of authorities dealing with the problem of Communism, not only English but French and Italian, and with my own translations of passages. I happen to be fortunate enough to know several languages, and I would take judicial notice of my own knowledge. And perhaps counsel might stipulate—I am sure they would—that some of the footnotes here, which refer to some of the Communistic doctrines, giving the chapter and page, including some quotations from the last Autobiography of Lenin, by Mr. Shub, might be brought to my attention as a judge, in other words, call the attention of Yankwich the writer, what Yankwich the writer says, to Yankwich the judge, that he would be able to take judicial notice of. [975]

I am sure, Mr. Eastman having been a Communist, which I have never been, and having been later a Socialist, which I have never been, could probably give us much more information and perhaps he might tell us things which I do not know and of which I don't take judicial notice, for instance, about some secret meetings at which the doctrines were discussed. All I know is the literature I find in the books and what I find in the decisions of the Ninth Circuit

as to what Communism is, including the rather famous opinion of Judge Haney, the late Judge Haney, in the case of *Branch vs. Cahill*, 88 Fed. (2d) 545, which was an immigration case in which some of the tenets of Communism were discussed and quotations given. Judge Haney and I, incidentally, graduated from the same law school up in Oregon, although not the same year, the Willamette University. I am saying that, if I were trying this case without a jury, I might, just for the sake of general information, broaden my knowledge of heterodox doctrines, Communism, Fascism and Naziism or any of these doctrines by hearing an expert like Mr. Eastman. But I am not trying this case alone. And, having lately refreshed my recollection from many authorities dealing with the problem, including such books as Northrop's *The Lenin of East and West*, published in 1946, and Andre Gides' book, *Retour de URSS*, and Professor Schlessinger's famous book on Soviet Legal Theory, all of these being books which are in [1976] most everyone's library and which are published mostly by the University Presses, including the famous treatise by Maynard on *Russia in Flux* and *The Russian Peasant*, I might, as I say, listen to a theoretical discussion which might broaden my information. But I do not think the question is material or that the question is one that is the subject of proof in this case. I agree that in the state of the law at the present time it is the law of California that the courts will not take judicial notice of the fact that the Communist Party advocates the overthrow of the government by force and violence and, if that

were the issue, we could have testimony such as is proffered by Mr. Eastman, who might call attention to certain facts, doctrines and documents which tend to prove the fact. I have in mind the criminal syndicalism cases which were tried in this state, with which every student of the problem was familiar, various California cases, in which the Supreme Court of California laid down a broad rule in allowing great scope in proving that certain members of the IWW advocated the overthrow of government and were guilty of criminal syndicalism.

I call counsel's attention to the discussion in the footnote which appeared in the issue of the Harvard Law Review, entitled Contempt Proscribed as Promoting Violent Overthrow of the Government. It is in Volume 61, beginning [977] at page 1213. It is a very thorough analysis of the type of evidence which is allowed to prove that fact, which makes it an offense to advocate the overthrow of government by force. There is also an article in the first issue of the Stanford Law Review, Volume 1, No. 1, on page 85, entitled Control of Communist Activities, which also bears upon the subject.

I am putting this on the record at the present time so that it will appear clearly that I know the circumstances under which the facts which it is sought to prove by Mr. Eastman have been held to be admissible.

To sum it up, the courts have held that, where the question of whether a person advocates the violent overthrow of government is an issue, an opinion by persons, like Mr. Eastman, who were avowed Com-

munists in the past, may be taken, and they may refer and bring to their aid the Gospel or the Apocrypha or the writings of Karl Marx and the writings of Lenin and the writings of other theoreticians, and they may also show that a certain particular gatherings of the particular group the idea of force was advocated. In this immigration case, for instance, Judge Haney pointed to the fact that the examiner had allowed, in order to tie the alien to the advocacy of force and, therefore, put him in the class of excluded persons from the United States, to be shown that he had actually in a speech stated that the object of the Communist Party, of which he was a member or with which he [978] was affiliated, that the Communists would change the capitalistic war into a civil war and overthrow the government, and this was related to the Communist Manifesto to the effect that they openly declared that their acts could be attained only by the overthrow of all existing social conditions. And Judge Haney and the court, speaking through him, held that that evidence was sufficient to form the basis for the conclusion that he advocated the overthrow of the government or was affiliated with a group advocating the overthrow of the government and, therefore, could be excluded under the immigration laws of the United States.

So the position that I take in excluding this testimony is not prompted by any unwillingness on my part to be enlightened by counsel for both sides, because I am quite certain that, if we go into a discussion and we take the testimony of Mr. Eastman, the plaintiff will be able to produce other writers and

perhaps persons who, like Mr. Eastman, had inside information, who might contend, on the basis that lawyers contend, that they do advocate a certain doctrine or they do not, because I am certain that in this case counsel, with their ingenuity, could prove, just as students of the Bible can, that every passage that says one thing may, in their opinion, be modified by another passage which says something else. And I would not be unwilling, if I had the time or was interested or needed the additional information, [979] to hear it or to have it heard in my courtroom publicly, although this court is not a forum for the discussion of Communism or any other ideology or political belief or governmental doctrine. [980]

So that, if I were convinced that it had a bearing upon the issue to be decided by this jury or by me, I would rule against the objection now made, but, being convinced, as I say, and for the reasons I have stated, that the problem is entirely alien, that the plaintiff has not been charged with Communism by the defendant as a ground for discharge, I think the entire inquiry is alien to the matter before the court. The only thing we have to determine is not whether Mr. Cole was, to repeat again, is or ever has been a Communist or a member of the Communist Party but whether his conduct before the Committee in declining to answer the particular question and in doing the things that he is charged with doing, his entire conduct, was such as to violate the morality clause to which I have referred. And as to that no expert proof is necessary. The jurors will be placed by the court in the position of being a part of the

public and they will have to determine whether his conduct was such as had that effect.

I think I have said sufficient to indicate my grounds and, if I have taken more time than is necessary, it is because, while we have discussed this matter, in the first place, the fact that such a person would be put on the stand was not brought to my attention until late in the afternoon of yesterday. The name was not mentioned. I wanted to state that Mr. Eastman is well known to anyone who is interested in [981] literature. One of my hobbies has been literature. I confess to even having been a book reviewer. Some of you are old enough to have read the book reviews which appeared in the Los Angeles Herald. There sits at the newspaper table Mr. Don Ryan of the Herald, with whom on many occasions I discussed books and all shades of doctrines, and then we put the summary of our discussions in the form of statements in that column.

So I thought it best to state that what I am saying does not reflect on the type of testimony or on the competency of Mr. Eastman but is merely grounded upon the fact that the objection is made to this testimony and it is my duty as the Judge to rule on it, and I am of the view that the admission of such testimony would be such grave error and would do such harm to the cause of the plaintiff that no higher court would ever sustain such a ruling. At times, if a matter is moot, I am willing to give one side or the other the benefit of the doubt, just as I am giving the defendant here the benefit of the doubt, which has existed from the beginning of this case, in

my mind, as to whether or not the question whether certain conduct has a certain effect is a question of law. There is a strong argument that can be made, just as I, if I were trying a libel suit, would have to determine whether calling a man a drunkard is libelous per se, and, if I determined whether an appearance before the Committee is not conduct which is violative [982] of this clause, if I did, there wouldn't be anything left. All I would have to do at the conclusion of the testimony would be to give my conclusion one way or the other and there would follow immediately a declaration for the party in whose favor I resolved the question. But on this particular point and on the other point of evidence, I am, after very arduous study, which has continued at all times and all hours, of the view that this testimony should not be admitted and the objection will be sustained.

To make the record, will it be stipulated that the offer made—are you listening to me, Mr. Katz?

Mr. Katz: Very carefully, your Honor.

The Court: All right. —may be considered as though it had been made in the presence of the jury, that it may be considered for the purpose of the record, to be written up, and as though Mr. Eastman had been actually sworn and had been allowed to give his background, as stated by counsel, his literary and other activities, which qualify him to be a witness on the subject, and that the offer shall be considered as though objected to in the presence of the jury and the objection sustained?

Mr. Katz: So stipulated.

Mr. Selvin: We will so stipulate. [983]

Mr. Walker: May it please the court, solely on the basis of a very recent and lengthy interview with Mr. Eastman, I would like to edit that portion of your remarks which related to his personal history.

The Court: That is all right. I may be wrong, just as I was with Mr. Johnston. You remember that I thought that Mr. Johnston was legally trained and he denied it positively.

Mr. Walker: Yes, your Honor.

The Court: I may be wrong. His name wasn't brought in. If his name had been brought in, I would have brought in the book. It just came in the other day, the "History of American Literature", and I am quite certain that his name appears there among the biographies. I have the Oxford book and I also have the three volume books just out which have been edited by Matheson, and I would have read for the record the biography. Bring the last "Who's Who".

Mr. Walker: The only thing I want to refer to, and I am sure this was an inadvertence—

The Court: Yes.

Mr. Walker: —is that Mr. Eastman was the editor of the old issue, the original.

The Court: "New Masses".

Mr. Walker: No.

The Court: But the original Masses.

Mr. Walker: The original Masses, which has no relationship [984] to the present publication, "The New Masses", except the similarity in names.

The Court: Well, that is all right. I will take

your word for it. I don't know either of them, because I haven't seen a copy for a long while.

Mr. Kenny: We will be glad to stipulate that Mr. Eastman was the editor of the "Old Masses", that he was tried for sedition and acquitted.

The Court: During the first world war.

Mr. Kenny: That is right.

The Court: That is right.

Mr. Walker: The last stipulation is not accepted, as it was no part of the statement to which I was addressing my attention.

The Court: All right.

Mr. Walker: The other proposition is that Mr. Eastman advises me that at no time was he a member of the Communist Party.

The Court: Well, all right. I did make that statement in injustice to him, I will retract the statement and ask that the record be deleted. I was under the impression that even though he was not registered as a Communist, that he was charged with being one and the "New Masses" and the "Old Masses" are associated in the minds of many; I am sure that Senator Tenney would contend, just as the Thomas Committee, [985] that there was continuity between the two, although the first one had many distinguished columnists and cartoonists and writers who wrote for it because of their literary excellency. At any rate, I will absolve him from the statement that he was a member of the Communist Party at any time.

I think as long we are talking, we will put into the record that we take judicial note of "Who's Who" and I think this is the Max Forrester East-

man. Is that the gentlemen you refer to? Is that his middle name?

Mr. Walker: I don't know.

The Court: Isn't that correct?

Mr. Walker: I don't know the middle name, your Honor.

Mr. Selvin: I don't either.

The Court: Well, it is the same man. There is no other Max Eastman in "Who's Who". I think he is the same man. He was professor of philosophy at Columbia. He is the same man. I think it is the same man.

(Whereupon the court read the following from volume 25 of "Who's Who in America":)

"Max Forrester Eastman, author, editor; born Canandaugia, N. Y. Jan. 4, 1883; son of Samuel Elijah and Anna B. (Ford) E.; AB, Williams, 1905; studied at Columbia, 1907-10; married Ida Rath, 1911; assistant in philosophy, Columbia, 1907-10, associate 1911; engaged in lecturing; "The Masses", 1913-17, the "Liberator", 1918-22. Organized first men's league for [986] Woman Suffrage in U. S. 1910; roving editor for Readers Digest since 1941. Member Delta Psi. Translator: The Real Situation in Russia, by Leon Trotsky, 1928; Gabriel, by Pushkin, 1929; The History of the Russian Revolution, by Leon Trotsky, 1932; The Revolution Betrayed, by Leon Trotsky, 1937. Author: Child of the Amazons and other poems, 1913; Enjoyment of Poetry, 1913 (21st enlarged edit., 1939); Journalism vs. Art, 1916; Understanding Germany, 1916; Colors of Life (verse), 1918; The Sense of Humor, 1921; Since

Lenin Died, 1925; Leon Trotsky, 1925; Marx and Lenin, the Science of Revolution, 1926; Venture, 1927; Kinds of Love (verse), 1931;''

He is very versatile.

“The Literary Mind, Its Place in an Age of Science, 1931; Artists in Uniform, 1934; Art and the Life of Action, 1934; Enjoyment of Laughter, 1936; The End of Socialism in Russia, 1937; Stalin’s Russia and the Crisis in Socialism, 1939; Marxism, Is It Science?, 1940; Heroes I Have Known, 1942; Lot’s Wife, a Dramatic Poem, 1942; Enjoyment of Living, 1947. Editor: Capital and Other Writings (by Karl Marx), 1932; Compiler and narrator: From Czar to Lenin, a motion picture history of the Russian Revolution, 1937. Compiler: Anthology for Enjoyment of Poetry, 1939. Home: Chilmark, Mass.”

So now, we will take that as authentic and it merely [987] shows that the gentleman is very well known and has had a great variety of activity. And I want to say that I do not want anything I say to be taken as being discourteous to Mr. Eastman. I intended to pay him a compliment, to show that I realize that by his wide reading it gives him standing so he could inform the court of many things. For one thing, he is a Russian student and that is one of the many languages I don’t know. [988]

So we will end the discussion on that.

Now, is there any other matter?

Mr. Selvin: Yes. We would like to offer to show the fact, there will be some objection to the admission of fact—that on November 24, 1947, Mr. Cole was cited for contempt of Congress by the House of

Representatives in consequence of his testimony before the Un-American Activities Committee.

The Court: On what date?

Mr. Selvin: November 24, 1947. It was before the Waldorf meeting and before this resolution.

Mr. Kenny: Just a moment. I can't stipulate that it was before the Waldorf meeting. The Waldorf meeting, Mr. Johnston said, took place at 12:00 o'clock.

Mr. Selvin: Between the 24th and 25th.

The Court: I don't think that will be objected to, the facts.

Mr. Kenny: Well, I can just give the actual facts.

The Court: I mean stipulate to the date. But I think that stipulation should be made in the presence of the jury. I will do this. I will do a Monroe in reverse. You know what I mean by a Monroe in reverse. I say that the objection that could be made is overruled in advance. I think that should be stayed not by comparison of any dates, but that on a certain date he was actually cited for contempt. [989]

Mr. Selvin: Certainly.

The Court: And that is an admission.

Mr. Kenny: But what I want is the hour of that day, your Honor, and that is what I want to point out. This Waldorf meeting started at noon on the 24th. Mr. Cole was not cited until 6:00 o'clock in the evening that day.

The Court: Of course, I wasn't there.

Mr. Kenny: I was and I would like to have that appear.

Mr. Katz: There were some other things, in addition, if this goes in.

The Court: Yes?

Mr. Katz: Then, we have the right to show that no charges in any court were filed against him on December 2, 1947; they were not.

The Court: I think that would be correct.

Mr. Katz: Now, there was not a charge.

The Court: Pending.

Mr. Katz: Yes, that is right. In other words, there is a—

The Court: Let us not argue. I know what you want and I think it is a reasonable request. We are keeping the jury waiting, now, gentlemen. I am trying to finish this.

Mr. Katz: And another thing, that Mr. Cole on December 2nd, no charges in court had been filed against him.

The Court: I will say no prosecution for contempt had [990] been instituted and I have already explained to the jury, in any court, that the mere citation for contempt doesn't mean anything. I have already told the jury, I think—you see, we have talked so much in the absence of the jury that I don't know half of the time that what I am saying now, if I have said it to the jury, but if you want me to, I will say this to the jury, that no prosecution has been instituted and the mere citation for contempt was not prosecution, that the government must decide and file an information charging him with contempt which is a misdemeanor—

Mr. Katz: That had not been done on this date.

The Court: That hadn't been done.

Mr. Selvin: That is a fact, and we will of course stipulate to the fact, but if the fact is to be presented

to the jury and create the inference that nothing was ever done, that the citation wasn't followed up, we would then object.

The Court: When you gentlemen are arguing the case, I will be like the proverbial cat at the rat hole, I will be watching every word you are saying, just as I watched it in court, because I am caught here between two situations, between the plaintiff, who would like to adopt a latitudinarian attitude towards their side of the case and try not only Mr. Thomas but the Un-American Activities Committee, which I declined to do as being outside of the province of this court, and the defendant, who would like me to try Communism as a [991] doctrine and Mr. Cole as a Communist and I haven't allowed you to do that.

I have laid down the rules—how successfully I do not know, because both of you brought in a lot of things I never thought would come in, by the tactics of yourselves, and each one of you has brought in something which I never thought would come into this lawsuit. It is not my fault. Had this case been tried before me without a jury, I would have taken the liberty, that I do many a time, of suggesting the line of evidence that I wanted to make out a case. But I cannot do that with a jury.

So I will see to it that the plaintiff's attorneys do not—provided of course you are also alert and remind me when I overlook a thing, that attorneys for the plaintiff do not draw any inferences from the facts which may not be warranted and are outside of the legitimate interest, and I will do exactly the same thing for them when you and Mr. Walker speak.

You know the French have a saying, “Avec des si on mettrait Paris dans une bouteille” (with ifs you could put Paris in a bottle), and that is what the late President Roosevelt called “iffy questions”. The judge should not be put in the position of making iffy rulings. In other words, I am ruling on the proposition and, if and when, or as bankers say, “as, if and when” and argument is made which is not a proper [992] inference, I will instruct the jury. But you gentlemen haven’t given me a blueprint of what you are going to say. I will give you a blueprint of what my instructions are going to be, because I am required to do so, by the law, even before you argue. So you can tell very well what I am going to instruct, when I tell you in the language of the rule what action I have taken on the instructions you have suggested, and when I tell what action I have taken on the instructions counsel has suggested, but, I don’t want anything in the record that would intimate that after the case is concluded and the arguments begin, that I am going to allow either side, by the nature of the argument, to get away from it and have to reopen the case for one side or the other. When the evidence is concluded, it is going to stay concluded and there will be a “period” in the proceedings, and I will see to it that counsel do not deviate from the rule that I laid down, by drawing inferences which are not warranted.

And I will be very glad to state to the jury, when we bring them in, as a stipulation, the facts that we have just been discussing, namely, that the Committee cited him for contempt, but that, that was merely a preliminary step which had to be followed by an

actual prosecution to be instituted in the name of the government before a proper court, and that on December 2nd, no such prosecution had been instituted.

Mr. Kenny: Can I correct your judicial knowledge? [993]

The Court: On what?

Mr. Kenny: The Committee cannot cite anyone for contempt. Only the House of Representatives can cite him.

The Court: I beg your pardon?

Mr. Kenny: The House of Representatives cited him at 6:00 o'clock, six hours after the Waldorf-Astoria meeting began—Mr. Cole was not cited at the time that meeting began on that date.

The Court: Listen, gentlemen, listen to me. We don't want to bring any comparative testimony before the jury.

If it is true that the citation was at 6:00 o'clock, then, I will merely state that he was cited by the Committee at such and such a time, without any reference to whether it was before or after compared with the time of the meeting.

Mr. Selvin: That is satisfactory.

Mr. Kenny: Yes.

The Court: I think we can agree on that, but I don't want either of you to make any comparative statement.

Mr. Katz: I think your Honor should recite our stipulation.

The Court: What is the hour at which it was?

Mr. Katz: We don't need the hour, in the light of your Honor's discussion. I think the stipulation

that we want is after the beginning of the Waldorf meeting but before its conclusion, Mr. Cole was cited for contempt. [994]

The Court: Well, but you are bringing in the time comparison again.

Mr. Katz: That he was cited for contempt on—what was the date, November 24th?

Mr. Selvin: November 24, 1947, is my understanding.

Mr. Katz: Is that right, Mr. Kenny, that he was cited for contempt on November 24, 1947?

Mr. Kenny: I am taking counsel's word for it.

Mr. Selvin: Well, we have the Congressional Record here, if there is any question about it.

The Court: Does the hour appear there? The legislative hours do not mean anything. I happened to attend a legislative session in 1911. I remember being there on Tuesday morning in a legislative session of Saturday afternoon, with the president of the California Senate, Senator Boynton sleeping on the floor of the Senate, waiting for the other House to do something.

Mr. Katz: We will stipulate that he was cited for contempt on November 24, 1947; that no action—

The Court: No prosecution was then pending.

Mr. Katz: That no prosecution in any court had been filed against Mr. Cole in connection with this matter prior to December 2, 1947.

The Court: All right. And then you can argue. I will so inform the jury. [995]

* * * *

Mr. Walker: While counsel is conferring, may I make a request of the court? Your Honor will recall

that the other day, before the jury, the question came up of bringing to Los Angeles Mr. Nicholas Schenck or Mr. Rubin. Counsel indicated that, in order to comply with the requirements of the court in regard to laying a foundation for the introduction of the motion picture showing the ten men, we would endeavor to bring Mr. Schenck or Mr. Rubin here. Subsequently, and out of the hearing of the jury, the court stated to us that, if these gentlemen came and gave testimony that we anticipated getting from them, it would not, in the court's opinion, make it permissible to introduce the motion picture.

The Court: I think you had better state it more fully. I don't think there is any record—or you have read it. I never look at a transcript. If the record indicates that they would merely testify that they heard the substance of what took place but didn't actually see the picture—

Mr. Walker: That is right.

The Court: —and that they didn't act with full knowledge of the picture, that foundation would not, in my opinion, be sufficient. [1026]

However, I said that, if they would testify that they had seen the picture and that they knew the substance of the testimony and that they acted on it, I would allow them to state it as fully as Mr. Johnston stated it from the witness stand yesterday.

Mr. Walker: That is correct. But your Honor did state that this testimony would not permit the showing of the motion picture.

The Court: Upon your statement that they could not testify that they saw the picture or were present at the hearing, and they now state, in a general way,

who had testified and what the testimony had been.

Mr. Walker: That is correct, and for that reason we stated we would not bring them out.

The Court: All right. That correctly stated what took place.

Mr. Walker: Because that occurred before the jury, I wonder if this might be read to the jury or your Honor make a statement of it.

The Court: I will make a statement.

Mr. Walker: I don't want it to appear that we failed to bring them—

The Court: That is all right.

Mr. Walker: —or that they failed to come in because of any lack of interest on their part. [1027]

* * * *

The Court: Let the record show the jury is in the box.

Ladies and gentlemen of the jury: As a result of the conferences which we have had in open court, which have lasted all morning, counsel have arrived at certain stipulations and it has been agreed that I state these stipulations to you, and after I have stated them, there will be some brief additional testimony, after which the evidence will be concluded and you will be excused until such hour as I shall determine when the arguments will begin.

So that you will not be worried, I will state to you that it is our intention to have counsel conclude the arguments today and you will be called back tomorrow for the final proceedings in the case, that is, the instructions will be read to you and the questions which you are to answer will be submitted to you for your deliberation.

First, it has been stipulated and as I have explained to you before, when a fact is stipulated, it means that all parties agree that it is a fact and that no other evidence is necessary to prove it, so counsel has stipulated that Mr. Cole was cited by the House of Representatives for contempt on November 24, 1947.

Now, counsel agree, and I state as a matter of law, that that citation merely means that the Congress has decided to turn the matter over to the proper authorities for further action. [1031]

Such citation is not in itself a prosecution. If it is followed by prosecution, a prosecution must be instituted in the name of the government of the United States before a court of the United States in the proper jurisdiction, whether it be the District of Columbia or in another state. In that case, it would be in the District of Columbia, which is a Federal district.

Then, it was also stipulated that no such prosecution for contempt in failing to answer the question was pending against Mr. Cole on December 2, 1947.

Now, is that statement sufficiently broad to satisfy both sides?

Mr. Katz: If the word "pending" is clear enough, yes.

The Court: Well, the word pending, was actually before any court.

Mr. Katz: That none was before any court on December 2nd.

The Court: That none was. It means that there was no prosecution before any court, for contempt,

which is a misdemeanor under the law, on December 2nd.

Yesterday, you heard some discussion or some reference to newspaper articles which were identified by letters, Exhibits F. G and H. I think that you heard the discussion which talked about the newspapers bearing upon dissemination, that is, upon spreading—in fact, I remember I got [1032] up and explained what the word disseminate means. It comes from a Latin word which means to sow. These newspaper articles were merely identified which means they were not in evidence. After further discussion between court and counsel, they are not offered in evidence at the present time and will not be offered in this case. Therefore, you are not to speculate as to what they contained or did not contain. You are to forget my lesson in philology about dissemination.

Yesterday, also, there was some question about the availability of two persons, Mr. Nicholas Schenck and Mr. Robert Rubin. It is J. Robert, isn't it?

Mr. Walker: Robert J. Rubin. Pardon me. J. Robert Rubin.

The Court: All right. Mr. Nicholas Schenck and Mr. J. Robert Rubin.

I think you also heard the statement to the court, while Mr. Maurice Benjamin was on the stand, that certain facts that they sought to elicit from Mr. Benjamin might be admissible if Mr. Schenck or Mr. Rubin, or both of them, were available. I think you also heard the statement that they were ill—

I don't know whether that was made—that they were ill or were not available, and that we might have to delay the conclusion of the case until they arrived. I want to state now that these witnesses are available and can be brought here to testify, but, in view of the discussion we have had and the [103] expressions I have given as to what effect their testimony might have, they will not be presented as witnesses in the court.

Is that satisfactory?

Mr. Selvin: Well, I think they will not be presented because it has been determined that the purpose which we sought to accomplish would not be accomplished by having them testify.

The Court: Will not be accomplished. All right. I accept that modification.

So, in other words, you are not to draw any inference that they are being kept off the stand wilfully by one side or the other. All I want to tell you is that because of the views which I have expressed on the law, it has been decided that their testimony was not necessary or would not achieve the purpose that they sought to achieve. I take the responsibility for doing the things which ultimately makes their appearance unnecessary. Do you understand that? All right.

In other words, we all want you to feel that we are not keeping anything that you should hear from your gentle ears, but, if any matters are kept away from you, either by way of testimony or by way of argument, it is because that in every case that takes

any length of time, matters arise which counsel for one side or the other think should be brought before the jury and the court has to rule against them, as I have done repeatedly as to offers on both sides. [1034] And when that occurs, the responsibility for so doing, then, is mine and if they are aggrieved by it, the higher court can correct the mistake that I make.

All right now, I think that is about all, gentlemen. With those stipulations, the defendant has rested and the testimony that you are to hear now is by way of rebuttal by the plaintiff, to bring up some questions that they think require elucidation.

No new testimony will be offered, but a witness or witnesses may be presented to counteract or to explain some of the testimony given by the defendant in the case.

Mr. Kenny: And your Honor, that will be very brief.

(And thereupon the plaintiff, to further maintain the issues on his behalf, offered and introduced the following evidence, in rebuttal, to wit:)

Mr. Kenny: We will call Mr. Cole.

The Court: All right.

LESTER COLE,

the plaintiff herein, recalled as a witness on his own behalf, in rebuttal, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Kenny:

The Court: Mr. Cole has already been sworn. I think you understand by now, ladies and gentlemen, that if a [1035] witness is sworn, that stands throughout the trial. He does not need to be sworn again if he is called back.

Q. (By Mr. Kenny): Mr. Cole, you heard Mr. Eric Johnston testify yesterday about the meeting at the Waldorf-Astoria Hotel on November 24th and 25th, 1947? A. Yes, sir, I did.

Q. Were you at that meeting at the Waldorf-Astoria Hotel?

Mr. Selvin: We will stipulate that he wasn't.

The Court: All right.

Q. (By Mr. Kenny): Were you invited to go there, by any producer?

Mr. Selvin: We stipulate that he was not.

A. No, sir.

Q. (By Mr. Kenny): Also, did any agent of the producers, Mr. Cole, invite you to go there?

A. No, sir.

Mr. Selvin: We will stipulate that he was not invited and that no attorneys or representative of the producers invited him.

Mr. Kenny: Will you stipulate that no officers (Testimony of Lester Cole.) of the Screen Writers' Guild were invited or attended that meeting?

Mr. Selvin: I will stipulate that no officer of the

Screen Writers' Guild attended. I don't want to infer that any officer was or was not invited. I don't know the facts [1036] in that connection.

The Court: Well, it is quite apparent that it was a business meeting of the parties concerned.

Mr. Selvin: That is right, your Honor.

Mr. Kenny: Of the parties concerned, except Mr. Cole. He was informed by—

The Court: No, no. I mean for the parties concerned in determining the policy.

Mr. Kenny: I just want to make this point.

The Court: I mean ordinarily employees are not invited to sit in with the board of directors, when they take action with reference to them.

Mr. Kenny: Well, there had been some reference to labor and management. I just want to make it clear.

The Court: Well, he wasn't there.

Q. (By Mr. Kenny): Did you ever write any pictures for Miss Katharine Hepburn?

A. No, I did not.

Q. Did you ever write any pictures for Mr. Charles Chaplin? A. No, sir, I did not.

The Court: Q. Did you act in any of them? I understood you to say that you did act, in your early career?

A. Well, it could be called acting; anything to make a living. It wasn't very much, but that was (Testimony of Lester Cole.) long before [1037] motion pictures—talking pictures were involved.

Q. You weren't in a mob scene? You weren't even in a mob scene?

A. Yes, sir, I was.

The Court: Well, all right.

Mr. Katz: This is one he had here.

The Court: All right, go ahead.

Q. (By Mr. Kenny): This statement which you attempted to read before the Un-American Activities Committee when you appeared on October 30th, before you went to that committee, did you have any copies prepared of that statement?

A. Yes, I did.

Q. And about how many?

A. I would say about 200 copies of that statement were mimeographed.

Q. And what did you do with those copies?

A. Following being excused from the stand, I distributed them to the press representatives at the hearing.

Q. All 200?

A. Well, I believe as many as would take them of the people from the press there. There were over a hundred members of the American and International press present at that hearing and I distributed as offense [1038] against the law? many as would be received.

Q. All right, one last question:

Have you ever been convicted by any court for any

A. No, sir, I have not.

Mr. Selvin: I object to that on the ground it is immaterial.

The Court: Well, all right. It is immaterial, but it will be to Mr. Cole's satisfaction.

Mr. Kenny: And it was also my last question. Your witness.

(Testimony of Lester Cole.)

The Court: All right. Have you any questions?

Mr. Walker: Yes. I will be brief in my examination.

The Court: Go ahead.

Mr. Walker: Mr. Cole—

Mr. Kenny: I wonder if we could interrupt. I did forget one question, just one further question.

Mr. Walker: Then, I first reserve my right to perhaps another question.

Mr. Kenny: That is all right.

The Court: All right.

Mr. Kenny: It is just this:

Q. Mr. Cole, did you ever have any public debate with Mr. McGuinness? A. Yes, sir, I did.

Mr. Kenny: All right. That was the question.

The Court: All right. Let us follow that up.

Q. That related to what? [1039]

A. That related to matters concerned with the organizations' differences in the fight that went on within the industry as to who would represent the writers, the Screen Writers' Guild or the Screen Playrights.

Q. And was that a meeting of the Association or was that held open to the public and also attended by the public generally, or merely by the persons connected with the industry?

A. Well, it was connected—it was the people connected with the industry.

The Court: In other words, it was a public debate and it was open, in a hall, where anybody could go, is that correct?

A. No—It was a meeting called for the purpose

(Testimony of Lester Cole.)

of the parties interested, the writers in the industry.

The Court: All right, go ahead.

Cross-Examination

By Mr. Walker:

Q. Was Mr. Chaplin in the employ of Loew's, the defendant here, at any time while you were working for Loew's?

A. No, sir, he wasn't, not to my knowledge.

Q. You know, do you not, through your knowledge of the industry, that Mr. Chaplin is his own producer or has been for a number of years his own producer?

A. I know that he has produced pictures himself, yes, [1040] sir.

Q. And he doesn't seek employment from other producers in the industry and has not for some time past?

A. I couldn't say whether he might at any time or not.

Q. To the best of your knowledge, that is true, isn't it?

A. I haven't heard of any such attempts to gain employment by Mr. Chaplin, from other companies.

Q. Is any proceeding of a criminal nature pending against you at the present time?

Mr. Kenny: Objected to as immaterial.

Mr. Walker: Counsel asked him whether or not he had ever been—

Mr. Kenny: Well, we will withdraw the objection.

The Court: Go ahead.

(Testimony of Lester Cole.)

A. Yes, sir.

The Court: Go ahead.

The Witness: Yes, sir, I am—there is a trial pending to the effect that I committed a misdemeanor, in which I have been charged with a misdemeanor.

Q. (By Mr. Walker): And that charge relates to the alleged contempt of Congress?

A. Yes, sir, that is correct.

Q. In connection with the proceedings that took place before the Un-American Activities Committee, as far as you [1041] were concerned, particularly, personally concerned, particularly concerned on October 30, 1947?

A. That is right, sir.

Mr. Walker: That is all.

The Court: All right. Step down, Mr. Cole.

Mr. Kenny: Just one question:

The Court: Just a minute.

Redirect Examination

By Mr. Kenny:

Q. There has been no trial and no conviction on those charges yet, isn't that right.

A. No, sir. There has not been. No trial.

The Court: All right. Is there anything further?

Mr. Katz: If your Honor please, we think we can reach another stipulation, very quickly, if we can approach the bench, Mr. Selvin and I. We have the figures and it will only take one second.

The Court: All right.

(Whereupon the following proceedings were had before the court, at the court's bench, without the hearing of the jury:)

Mr. Katz: We want to show that between the period October 30th to December 2nd, 1947, the picture "Fiesta", written by Mr. Cole, was shown—and the figures are all stipulated to—in 871 theatres, for the period between Mr. Cole's appearance and the date of the termination. [1042]

And we would show that between December 2nd, 1947, up until a recent date, it continued to be shown and has been shown in 2,365 theatres.

We will also show the date of the first general release of *Fiesta* and the general exhibition.

With respect to *Romance of Rosy Ridge*, we would show the number of theatres in which it appeared between October 30, 1947, and December 2, 1947, and I would be willing, if counsel desire, to show the total number of showings of the pictures from the time of their first release until the last date available.

With respect to *High Wall*, it was not released until February 2, 1948.

The purpose of the introduction is to show that the employer was not prejudiced, as a matter of fact, to show as a part of our showing that there was waiver and condonation and also as a part of the showing, it goes to the question of whether the public was shocked between October 30th and December 2, 1947, by the fact that Mr. Cole's name as a writer had appeared on these films at these times.

There is no dispute on the facts. It is just a question of admissibility, as I understand.

Mr. Selvin: We object to the offer upon the

ground that it is immaterial and irrelevant and not in rebuttal of any evidence produced by the defendant, since there has been no [1043] evidence of any financial or monetary influence or loss offered in this case——

Mr. Katz: It is rebuttal.

Mr. Selvin: And upon the further ground that no proper foundation has been laid in this: that the figures by themselves offer no standard or criterion to determine whether anybody did or did not see this picture because of the conduct in question. They merely reflect gross showings.

Mr. Katz: Total number of showings between these dates. [1044]

The Court: I think this: waving aside the question of whether it is proper rebuttal, which I am willing to do, in a case like this, I believe the bare fact that it was shown has a bearing, not on prejudice, because that is not the question of proof, but as a part of the evidence already introduced upon which they base an instruction which I will give in modified form as to whether the continued employment and other things may be considered as a waiver. To that extent, the fact that it continued to be shown goes along with the fact that they continued to employ him and keep him working, which the court or the jury may do, because it is the law that if, with full knowledge that a condition—that a reason for termination exists, the employer waits and then, after a certain time all of a sudden decides that he would exercise that, it presents a question to the court and jury,

just as was held in Goudal against DeMille, whether that was a waiver, and that is a question I intend to submit to the jury.

Mr. Selvin: Yes, but the mere fact that the picture was exhibited would have no tendency at all to show any waiver, because among other reasons under the contract, even if the contract were wholly terminated for cause, the right to continue showing pictures, based upon Mr. Cole's work, would continue, because Mr. Cole's work was absolutely acquired under the contract. So that the continuation of the [1045] pictures is no evidence of any adoption or confirmation of the contract or of any relaxation of the contract or of any intention, with knowledge of facts, entitling one to terminate it altogether. Now, the question of exhibition of the picture has nothing to do with the termination or non-termination of the employment.

I will say, frankly, I do not want to prolong the argument. I want my objection noted. I have stated briefly the grounds for it and as far as I am concerned, I will submit it.

The Court: I think that if the bare fact is introduced that they continued to show his pictures, for whatever inference the jury may draw from it, I believe you are right in claiming that they had a right to use the pictures regardless of the employment, but, the fact that they were shown has a bearing upon the question of condonation or waiver.

Mr. Selvin: I have only this suggestion: If the fact that they were shown is placed before the

jury, then I would like to have the figures to which Mr. Katz and I have stipulated shown also.

Mr. Katz: All right, I will read them all. I have them.

Mr. Selvin: Yes, you have them.

The Court: I am inclined to think that to that extent [1046] I wouldn't use the word "waiver" now. I would merely say that they will be received as bearing upon the conduct of the defendant towards the plaintiff. I will tell the jury.

Mr. Selvin: Very well.

The Court: All right.

(Whereupon the following proceedings were had before the court and jury, in open court, within the presence and hearing of the jury:)

Mr. Katz: I am pleased to state to the court and jury that we have reached a stipulation with respect to the following facts:

With respect to the picture *High Wall*, on which Mr. Cole received credit as the writer, that picture was released on February 2nd, 1948, and appeared in 11,983 theatres.

The picture *Fiesta* upon which Mr. Cole received credit as a writer, was first released on July 18th, 1947.

Between the date it was first released, July 18, 1947, and December 8, 1948, that is the last counted date that we have, between July 18, 1947, and December 8, 1948, the picture *Fiesta* was shown in 14,365 theatres.

Between October 30, 1947, and December 2, 1947,

in that five-week period, it was shown in 871 theatres, and from December 2, 1947, to December 8, 1948, it was shown in 2,365 theatres.

With respect to the picture *Romance of Rosy Ridge*, [1047] on which Mr. Cole received a credit as a writer, that picture was first released on July 15, 1947. As of October 14, 1948, it had been shown in 14,149 theatres; and with respect to the picture, *Romance of Rosy Ridge*, between October 30, 1947, and December 2nd, 1947, in that five-week period, it was shown in 1,730 different theatres, and between December 2nd, 1947, to December 8, 1948, it was shown in 3,206 separate theatres.

And as I have said, these three pictures were distributed by Loew's, Incorporated, in that period, in that amount, and on them was the name of Lester Cole as one of the writers.

Is it so stipulated?

Mr. Selvin: Yes, that his name was on it as one of the writers in the manner in which he indicated in his testimony.

Mr. Katz: In small print.

Mr. Selvin: In small print.

The Court: All right.

Now, ladies and gentlemen, I have indicated for the record some of the technical legal grounds for admitting this testimony. In fairness to both sides, I should state in simple language that this testimony is admitted so far as the period beginning following December 2nd is concerned, as bearing upon the conduct of the defendant toward the plaintiff. You, of course, will have to determine

what bearing [1048] it has or what bearing it does not have.

The figures related to the period before December 2, also bear upon the relation of the plaintiff and the defendant prior to that time and also bear upon the fact of whether or not—I put it this way where there is an admission on the subject—whether or not his work, Mr. Cole's work as a writer was satisfactory to the defendant. I think I will not refer to any testimony, but there has been testimony on the subject and I think these figures have a bearing upon those matters.

It is hard to make a division line as to dates, but I have done that in order to indicate the limited scope for which these figures are being received.

Is that satisfactory to you gentlemen?

Mr. Katz: It is satisfactory.

Mr. Selvin: Yes, your Honor.

The Court: All right. Is there anything further?

Mr. Kenny: The plaintiff rests.

The Court: Is there any surrebuttal?

Mr. Walker: No. The defendant rests.

The Court: All right. [1049]

* * * *

The Court: Let the record show the jury have retired.

Gentlemen: So that we will understand, as I said before, I do not think that any of you has tried a jury case before me and as I have told you, while the rules are the same, the technique of each judge differs.

I have already explained to you why I take oc-

casions to deal with instructions. Rule 51 reads:

“At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed.”

And then it says: “No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict”——

Then: “Opportunity shall be given to make the objection out of the hearing of the jury.”

So, I will, at the present time, indicate to you my action upon the instructions you have submitted. If you desire to state your objections at the present time, you may. If not, you may do that after the instructions have been read. You will have the right, anyway, because on some of these instructions I may change my mind as I go along and I take it that the objections are to be presented before the jury retires.

I have explained to you why I feel this is fair to the parties, because otherwise you would have no way of objecting to general instructions which I may give, which weren't suggested by either, and would not have any chance to object to any modification of the language which I introduce into the reading even as I go along.

I will, therefore, take the instructions as pre-

sented—we will take the plaintiff's, and I will indicate in a general way my action upon them. As to any of the matters, when I say that I will give the particular instruction, it doesn't mean that I will give it in *haec verba*. After the first selection of the instructions and their transposition to a different kind of paper, I will do a lot of editing. Sometimes an instruction is rewritten four or five times and I cannot tell until I read it whether I have made many modifications. It would be too much of a job to do it.

As I have told you, all of the instructions that you have proposed are rewritten and worked over, but, when I inform you that an instruction is given, it means that the substance of the instruction of one embodying the same principle of law will be given. [1053]

* * * *

As to the defendant's requested instructions, the defendant has, to my hard luck, indulged somewhat in laconism; they have been too brief. They have left me the job of formulating into instructions their theories. I am not complaining but I want to tell them this is one case where being too brief wasn't altogether what I expected. I would have appreciated a little more help along the line. Most of [1062] the instructions suggested are general instructions. You have been given by my clerk a mimeographed copy of my own instructions—I had them mimeographed recently because I use them so much—which, in three pages, gives the general instruction relating to burden of proof, that first

instruction, which I devised when I first went on the bench, and telling the jury right from the start that nothing that I say shall be considered an expression of opinion by me or, rather, I mean that I do not choose to express an opinion.

Your instructions Nos. 1, 2 and 3 are general instructions. No. 3 will be supplemented by an instruction of my own, which I have used for a period of years, about the duty of the jury to confer with one another, which differs in some respects from your instruction. Incidentally, Mr. Selvin, my instruction about any intimation on my part is broader than yours, except that I tell them I have a right to do that but I don't choose to exercise it. You tell them that they must disregard it, which is the State rule but not the Federal rule.

Mr. Selvin: Mine were taken from BAJI.

The Court: Yes. No. 4 I have copied and marked that I will give it. But, gentlemen, I think that portion of the instructions I have is much more orderly; that, when I take up each of them, I will do it more orderly when I read the form of the questions and tell them what is expected from them as to each. No. 3 I may give. It is a good instruction. Incidentally, I liked it so much that I had several copies made to use. It deals merely with direct and indirect testimony. I have one which I used in criminal cases but it wouldn't do in this case. I may use it but I don't know whether it is helpful one way or another. We are putting before them a charge that will have to be voluminous and we are putting before them definitions

which may have little meaning to them. I have no objection to it. It correctly states the law, but I may pull it out. As to No. 6, I will give it merely by referring to the exhibit. I didn't want to enumerate what has been stipulated to because, since these were written, we have had additional stipulations, and I may even now add "and other stipulations made in open court." Incidentally, gentlemen, in this case, as in every case I try, I am giving a two-page summary of the pleadings. I quote the letter in full, eliminating the salutation, and the answer, as my first instruction after I instruct the jurors as to the credibility of witnesses. I start in by saying, "This is an action for declaratory relief," which seeks this and that, and give the controversy and then say the controversy turns around this letter and it, in turn, relates to a clause of a contract which is as follows, and I will read that clause of the contract. Other than that, I am not going to attempt to summarize because it is difficult to make a [1064] summary and not comment, and I am not going to comment on any phase of the case. Unless, by your arguments, you call for some observations to be made, I shall observe what has been my rule, from which I have deviated in only one case, and that was a criminal case in which I thought some facts might be misleading to the jury and I did comment in the hope they might not disregard certain things. No. 7 will not be given in that form. I have worked on an instruction in which I have stated, as the law of California, that it is libelous in California to

call a man a Communist, as tending to bring him into disrepute. I am satisfied, from my reading, that that is the law of California and there is nothing in the Huntington Park case to the contrary. There nobody was charged with being a Communist. They merely criticized the way in which the School Board was being conducted and the article merely said there were Communists in the community and the court states, and correctly, that no one is charged with Communism. And I take the law of California to be as declared in the Gallagher case, that that is the law, and also in view of the Court of Appeals decision in the case of Branch vs. Cahill. I began this case by holding a contrary view but I am satisfied now that, as the courts have held, it is libelous to call a person a member of the Ku Klux Klan or to call a man a member of the Bund. As I told you before, I am going to modify that instruction by also [1065] saying that, under the law of California, a man may be a member of the Communist Party and that it is a legal party and that the court does not take judicial notice of the fact that the Communist Party advocates the overthrow of the government by force or violence; further, that Communism is not an issue in this case; that the defendant hasn't charged the plaintiff with being a Communist; that, while it is true that a charge of Communism is libelous and is one which has the effect of subjecting a person to obloquy and so forth, nonetheless it is the rule that, when a charge of that character is made, he who makes the charge has the burden of

proving it, and that in this case the charge is not made and it is not a ground and, therefore, the question of whether he is or is not a Communist is not within the scope of it. It is a very elaborate instruction, which will give to the jury and will emphasize that the statements that were brought in here by witnesses, including Mr. Cole, that he was charged with being a Communist, were brought in merely for the purpose of showing that these charges were made and that the truth of these charges is not before the court and that the defendant has not charged him with being that and has not grounded its defense upon that ground.

That is enough for the present on that particular matter. You will have opportunity to object to any portion of the instruction after it is given. I am satisfied that it should be given in that form in view of the turn that the testimony has taken and in view of the fact that the plaintiff testified that the charge of Communism was made against him in the trade press and that that was discussed and in view of the fact that Mr. Johnston was allowed to give the opinions that he expressed as to what the Communist Party is and so forth. I am giving this full instruction and I will repeat the admonition I gave, and, in fact, the phrase which I am going to use and the admonition will be along the same line, that the testimony was received only for a particular purpose. I have worked very hard on this instruction. I don't think it will be satisfactory to each of you. The reason is I am taking a different view than you took of the scope and,

now that you have conformed to it, I think I will express my view of the law in this instruction. You may be surprised and not object to it at all. I think the way it is worded cannot be objectionable if my interpretation of the law is correct and I am satisfied that it is. No. 8 is a part of the oral instructions which I shall give.

Now we come to the form of the verdict. I will not give any of the nine questions, filed on December 10th, as a part of the special verdict, or any of the four [1067] additional questions on the 13th. I do not intend to split this lawsuit up into segments and have the jury render its opinion on 13 segments and take the risk which that policy would imply. I call your attention to the fact that the rule gives the court great power in determining the form in which a special verdict should be and the questions which shall be propounded. I have combined into three questions the five questions suggested by the defendant and I will take the time and read them into the record for you. What I have done, as I have told you before, is to divide the morality clause into three parts. One relates to the effect of the conduct on Mr. Cole. Another relates to bringing him into contempt, ridicule or obloquy. The next relates to whether his conduct was of a character to shock, insult or offend the community, and whether it prejudiced the defendant.

The questions are as follows. I will read the entire form of the special verdict and then, if you want to make brief comment, I will let you do it. It is entitled in the court and cause. "We, the

jury duly empanelled and sworn to try the within cause, hereby make the following answers to the following specific questions:

“Question 1: Did the plaintiff, Lester Cole, by his statements and conduct before the House Committee on Un-American Activities and otherwise in connection with the [1068] hearing held by said committee, bring himself into public hatred, contempt, scorn or ridicule? Answer yes or no.

“Question 2: Did the plaintiff, Lester Cole, by his statements and conduct before the House Committee on Un-American Activities and otherwise in connection with the hearing held by said committee, tend to shock, insult or offend the community? Answer yes or no.

“Question 3: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities and otherwise in connection with the hearing held by said committee, prejudice the defendant Loew's, Incorporated, as his employer or the motion picture industry generally? Answer yes or no.

“Dated this day of December, 1948.” [1069]

* * * *

Mr. Katz: We will reserve our objections or exceptions to the instructions. We would like to state with respect to the special interrogatories that we ask, first, their amendment to include whether Mr. Cole, by his acts and conduct, wilfully or intentionally violated, as we think that is a question for the jury. We ask that that phrase “wilfully

and intentionally” be added to each interrogatory. [1074]

The Court: Your theory is entirely different from mine. The wilfulness attached to the act and not to the violation. You would make me say that, if he believed that his act wasn't a violation, that would be a ground for excuse and that is not the law. What is required to be wilful is the act in doing it, and I will so instruct the jury.

Mr. Katz: We would ask the excision of that portion of each question which refers to “or otherwise in connection with the hearing,” by reason of the fact that all of the evidence is now before the court, and either we are entitled to an instruction on what Lester Cole said or did before the Committee or some comment by the court with respect to the fact that, having the same lawyers that other people may have had or joining in an open statement, that, in and of itself, is the only thing which could conceivably reach the problem “or otherwise in connection with the hearing.” And the interrogatory as it stands now with that phrase included, “or otherwise in connection with the hearing,” asks the jury, first, to answer the question as to which it has no evidence of any kind. And we, therefore, ask for the excision of that phrase, which we think might allow endless speculation, unnecessarily. There is nothing in this record, as it is now closed, other than what Mr. Cole said and did before that Committee. They have heard the record and have seen the picture. And we believe that, notwithstanding the fact that [1075] the language is a sort of

catch-all in the contract, since this a special interrogatory directed to the jury, which is to be placed before the jury, we ask the excision in each question of that phrase.

The Court: I will hear from counsel on the other side on the matter. At the time these were prepared, the full scope of the testimony was not in. It is evident at the present time the only thing you complain of is his statements and his conduct before the Committee. Of course, you may draw inferences as to any showing of any concerted action or anything like that. But I think there is merit to that suggestion.

Mr. Selvin: Properly to go into the subject, your Honor, I think would take a substantial length of time. We have asked to reserve our exceptions and we would like to reserve our reply. I would like to call your Honor's attention to the fact that we are now 13 minutes away from the time that we are supposed to start the arguments.

The Court: I will give you some time, gentlemen, to go out and have lunch. It was your request, gentlemen, that this case was continued for one week.

Mr. Walker: We asked it for a purpose which seemed to be a good purpose.

The Court: Please don't consider me a tyrant. I have worked right along on it. If you don't want to state your [1076] grounds, I will use my own judgment.

Mr. Selvin: We have sought to indicate through this, although most of the evidence which we sought

to produce in that regard was excluded, that there was concerted action, and that, to the extent that there is any evidence of what happened before Mr. Cole took the stand, he is responsible for it. Our notice is not limited to what Mr. Cole did in propria personam. It is whatever he did in connection with the meeting and, therefore, he is responsible for anything by anybody with whom he may have been in concerted activity.

The Court: I will tell you right now I am going to exclude that clause because the presence of that in the notice does not gauge the scope of the inquiry. The evidence in the record shows it and the only reason why his connection with others is brought in is to show wilfulness and not as primary facts. You may be excused until 3:00 o'clock. If you want a longer time, I will give you until 4:00 o'clock.

(A recess was taken until 3:00 o'clock.)

Los Angeles, California,

Thursday, December 16, 1948, 3:10 p.m.

The Court: Gentlemen, I have not called in the jury for the present, and the record will show that the following proceedings were still had outside of the presence of the jury:

I did not call in the jury because I want to correct any erroneous impression that the discussion that we had this morning may have created.

I am not trying to compel counsel to state at the present time any objections to the instructions. As I informed them, they have a right to do it at the

proper time. I am not required by law to do anything but indicate what I have done on the demands of the plaintiff and of the defendant.

However, I have gone beyond the requirement of the law and have indicated very fully the scope of the entire charge to the jury.

However, the plaintiff, having raised the question as to the wording of the proposed special verdict, I request counsel for the defendant to state their views. They have indicated by their statements that they may not have had full opportunity of presenting their views. So, I am asking them now to state any additional view they desire. All right, Mr. Selvin.

Mr. Selvin: I am conferring, if I may have just a [1078] moment with Mr. Walker.

The Court: All right. Merely through the suggestion of counsel that the language be changed. Any other objection that you may have, although I can't see how you can, because the terminology is yours—all I have done is to reduce five questions to three; of course, you have a right to insist that they be split into three, just as they wanted me to split the whole thing into the five.

Mr. Selvin: I am not insisting on that and I am not objecting to the inclusion of any of the terminology counsel suggests. I am objecting to the exclusion.

The Court: But I mean in answer to the argument, now, to their proposition that the wording should be changed.

Mr. Selvin: I stated our position tersely but I think sufficiently to indicate our point of view. There

is one thing I would add to it, at this time, that in connection with the hearing, the evidence shows that Mr. Cole presented but was not permitted to read a certain statement. The evidence this morning shows that somewhere between a hundred and two hundred copies of that statement were distributed to the press and presumably were published. That is, in fact, activity or conduct otherwise in connection with the hearing, upon which an argument could be based, and that is an additional ground as to why we object to the exclusion of that language. [1079]

The Court: I think, gentlemen, that the entire situation may be solved by eliminating just the term "and otherwise," not the entire phrase "and otherwise in connection with the hearing held by said committee," but just the term "and otherwise." Those words were used in the notice, but I fear that by allowing them to remain, we may leave an opening for speculation as to other conduct.

I agree with counsel for the defendant, that the conduct in relation to the hearing is a subject of argument, but the use of the word "and otherwise" might indicate other conduct than the appearance, and if we eliminate the words "and otherwise," leaving the phrase to read, "Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said committee, bring himself," and so forth, eliminate just those two words "and otherwise," we eliminate the possibility that we are talking about anything except what he did and said in connection with the hearing.

There is no attempt to limit counsel in their argument to a particular contention. The acts of others have been gone into merely to show the willfulness of the act, but as I said, in answer to the objection of the plaintiff, that "willfulness" should not be incorporated into the question, that is a subject for instruction, because it is [1080] one of the elements of conduct. You cannot split a question like that into segments by asking the jury to pass on one phase of the activity. The jury have been fully instructed that it must be willful and the sense in which it was willful. The conduct must be willful, but you cannot frame this question in such a manner as to avoid confusion, unless you limit it to its essentials. If you put the word willfully in, I would have to follow it up by a definition of willfulness, I would have to ask them if they understand what is meant by willfulness and the like.

Now, if we eliminate these words, then, we avoid the possibility of their considering any conduct other than that as to which evidence has been given in this case.

If I remember correctly, in the early stages of the case, it was claimed that under that word his other acts might be gone into under the contract. Whether that could have been done or not is not before the court or jury.

The fact remains that the only evidence to which the testimony was directed is the conduct before the committee in connection with the hearing held by the committee.

And so phrased, I believe the question will prop-

erly state the issue and avoid the possibility to which I have alluded.

Mr. Margolis: We have one or two matters, your Honor, that weren't covered this morning, the discussion immediately [1081] following the raising of this point. Can I go into those now?

The Court: No. I am only interested in this form. You can defer your objections to a later time and I will hear you then.

Mr. Margolis: We do have another question on the form.

The Court: Well, what is that?

Mr. Margolis: Well, I will state this, your Honor. Your Honor this morning indicated, as I understood, that he was going to give an instruction on the question of waiver. It seems to us that waiver requires a special interrogatory, for this reason, your Honor: That the interrogatories relate to the conduct of the plaintiff in this case, whereas, waiver relates to conduct of the defendant in this case and, to have that instruction, without an interrogatory in which the jury would understand that when it goes into their room one of the questions that they will have to answer will relate to the conduct of the defendant and not simply to the conduct of the plaintiff, we think would lead to a great deal of confusion.

Just to summarize, if I may, one sentence, your Honor, it is this: That, where, on the one hand, the interrogatories deal with the conduct of the plaintiff, the instructions and the evidence, on the other hand, deal with problems—not his conduct but the conduct of the defendant, and that [1082] could only be un-

derstood, it seems to us, by the jury, if there are interrogatories relating to the conduct of the defendant, as to whether or not it had waived any enforcement of the contract, even assuming that the plaintiff conducted himself in such a manner as to violate the contract. After all, that is the whole theory of waiver.

The Court: All right, Mr. Selvin?

Mr. Selvin: Our position on that, your Honor, is that if waiver is properly an issue of fact in this case (if it is), and if there is a conflict in the evidence in that regard, then, it is, of course, a matter that should be submitted to the jury. However, we take the position that there is no issue of waiver in this case whatever. The pleadings raise the issue of performance, not waiver of performance. And the rule is well settled, I think, that in a contract action where waiver of performance, rather than performance, is relied on, that fact must be pleaded.

The Court: Well, this is not the type of action that has been brought in without pleading. We are not dealing with the ordinary action. In an action for declaration, the question is not what has been pleaded. The question is, is it an issuable fact? And I have already stated that I consider it an issuable fact, because I am going to give instructions on the subject, so the mere fact that he couldn't have pleaded it in anticipation is not a ground [1083] for objection. The evidence was directed to it and I shall give instructions as to whether the conduct is of that character.

Mr. Selvin: Well, as I say, our position is that the only issuable facts pleaded, whatever the form of

the action, are (1) whether or not the plaintiff duly performed, and that anticipates our claim of non-performance by pleading that affirmatively; and (2) whether the statements in the statement are true or false. The questions to be presented to the jury, as they are formulated relate to that last question, because those are the issues as raised by the pleadings, but there has never been any issue of fact raised in this case with reference to waiver. The fact that facts come in relative to an issue unraised does not put the unpleaded issue into the case.

The Court: We don't have any such strict rule on pleading in this court and especially with the declaratory judgment statute, regardless of the fact of whether they are pleaded or not, if there is evidence you can make findings without even amending. In other words, at the present time we have the same rule as applied in equity, provided the court has allowed the testimony to go in so as to create an issue. As a matter of fact, the theory of creating an issue is now abandoned. Now we have what we call notice pleadings. So I do not believe that that point is well [1084] taken in any action, especially an action of this type. All right. Well, I will give the matter some thought. I have heard your views and I will at the proper time inform you. I may say, now, that subject to objections on both sides I will probably delete those words "and otherwise" in connection with it and leave it as it stood, but I will determine later on and inform you whether I will insert an interrogatory that will put the question of waiver before the jury. I am inclined to think that that is worthy of consid-

eration and that it is an issue. If your view is correct, then I should eliminate entirely any instructions on waiver.

Mr. Selvin: That is right, your Honor, and that is going to be one of the objections which we are going to make to the charge.

The Court: Well, you have had a good deal weigh in the formulation of these interrogatories and that was merely because I felt that you were justified, but I am in doubt and, as I have great discretion in formulating the questions, I will consider the matter and will inform you before the case is concluded what interrogatories, if any, I shall submit. [1085]

* * * *

Opening Argument by Mr. Kenny

Mr. Kenny: Ladies and gentlemen of the jury, Mr. Walker, Mr. Selvin and Mr. Rudin, and Judge Yankwich:

This has been a long trial and I think by now most of you must know a good deal of the truth about these "family" fights that we have occasionally out in Hollywood and that is why we have a trial by a court, not a trial by a committee, nor a trial by headlines nor a trial by gossip. Here is a trial by a court, where, as you have heard many times, a man is presumed to be innocent until he is proven guilty, where full cross-examination is had, and Mr. Walker, you will recall, had an excellent and full opportunity for cross-examination of my client, Mr. Cole. That makes a long trial, but that is the way we get at the truth in the American way and in the American system.

I think the jury here is now pretty well in possession of all the whole truth about the Hollywood "family" fights in recent years. I think you know, probably, more right now than almost anybody in Los Angeles about the background of this particular long controversy.

I think, by now, you are also aware that the truth isn't always as simple or as easy to arrive at, as it would seem. You know, headlines and gossip have a way of making things seem very simple because they are all compressed there. But things that are simple are not necessarily true. [1090]

And so that is the purpose of trial by jury and the purpose of cross-examination. It is the way that we have devised after hundreds of years of our Anglo-American jurisprudence, the way of learning what the truth really is.

Well, by now, I guess it is pretty apparent to you all that Mr. Cole has some friends and he has some enemies in Hollywood.

He has testified that when he and others left for these Washington hearings, he attended a meeting at which there were some 5,000 people present to send him off, a meeting at the Shrine Auditorium at which Mr. Gene Kelly, a star of the defendant corporation, was the chairman.

And you have learned about his enemies, too. His enemies are the result of a 12 or 13 years fight in the rival writers' organizations, the comparatively long fight that resulted in a contested election before the National Labor Relations Board.

So I think Mr. Cole's enemies would like to have

you treat this case as a very simple matter, just treat it according to headlines, treat it according to gossip and they would like to have this jury go out and say—well, they would like to have this jury adopt their smears and attacks and say that because of their smears and their attacks they were able to get an American jury to have Mr. Cole's contract rights suspended. [1091]

But, remember, we are in a court and Judge Yankwich has mentioned, time and again—he mentioned one thing, he said we all take notice of those kind of Billingsgate that goes on in industrial controversy. Well, it occurred in this controversy and you remember, Judge Yankwich left it out and he instructed you, time and time again, that the matter of Communism and Communistic sympathy was not an issue, and said to the jury, and he undoubtedly will instruct you again, that this jury is not going to be called upon to say whether Mr. Cole is or isn't a Communist.

And he is going to tell you, and I think he has already told you, that Mr. Cole wasn't suspended for being a Communist or not being a Communist. He was suspended, if you recall, according to the notice of suspension, and it will be your duty as a jury to determine whether or not the employer was justified, under the terms of the contract, in suspending Mr. Cole for the particular acts and conduct of Mr. Cole before that House Committee on Un-American Activities.

* * * *

[1092]

I think one thing that might have impressed you as much as it did me was the newsreel showing Mr. Paul McNutt, the former Governor, who was then,

although Mr. Johnston said he is not now, the attorney for the producers, and he made a real fighting speech. He was a lot tougher on that committee than Mr. Cole was. It was a good fighting speech and one that any good American would enjoy. I think we have some testimony on that. If I don't quote it correctly I know Mr. Walker will straighten me out. This is what Mr. McNutt said on October 22nd, "There will not be a blacklist. There is nothing—" Governor McNutt expressed himself and what he said was that it was a shocking denial of free speech by the committee. All of those are statements by Governor McNutt.

Mr. Walker: Just a moment. I am very reluctant to interrupt counsel but it seems to me, your Honor, in view of the fact that you did not permit us to go ahead with any of this in regard to concerted action on the part of the group of people, it is hardly appropriate for counsel to make [1098] an argument with reference to this blacklist matter, which they allege.

The Court: I didn't really catch the observations that Mr. Kenny made. Will you read them?

Mr. Kenny: I think, Judge, I was talking about Governor McNutt. I admit I don't have his exact words before me, and I can pass on to something else.

The Court: I will say to the jury, in view of the limitations of the testimony, we are not concerned with what was done in regard to others in this lawsuit. We are only concerned with what was done to Mr. Cole, and the only reason why matters relating

to others were introduced at all or were referred to both by the plaintiff and the defendant was as bearing upon the willfulness of the act with which Mr. Cole was charged and as a ground for his suspension.

And this gives me an opportunity to give you this warning. Counsel, in arguing the matter, both sides, will give you their versions of the testimony but, ultimately, you will have to rely on your own recollections as to what was testified to in determining the case. What counsel say was the evidence is merely their recollection of what was said and done. Their recollections may be faulty.

And, incidentally, as I informed you before, all of the exhibits containing any statements, which were offered [1099] in evidence, will be before you and, if during the course of your deliberations some doubt arises as to what a witness testified to in a certain case, you have a right to come back into the courtroom and have that portion of the testimony read to you. We do not send out to the jury either depositions or portions of the testimony that may have been transcribed and written up. As you have noted, two reporters, in relays, have taken down every word that any of us has said and that can be transcribed and used to refresh the jury's recollection, not in the jury room but here in the courtroom. I think that is a sufficient statement to make at this point, gentlemen. Go ahead. [1100]

* * * *

The Court: Let the record show that the jury is in the box.

INSTRUCTIONS BY THE COURT

The Court: Ladies and gentlemen of the jury, the taking of the testimony in this case was closed yesterday and you heard the arguments of counsel, giving you their conclusions from the facts in the case. Before the cause is submitted to you, there remains the performance by the Judge of this court of the most important function which a Judge has in a civil case which is tried wholly or partially with a jury and that is the duty of the Judge, under the mandate of the laws of the Congress, to instruct the jury as to the law that is applicable to the case. This I shall now proceed to do. The instructions are all written and I shall read them to you as written, making, as I go along, such changes as may occur to me to be needed, in order to avoid repetition, or changing the turn of a phrase to make it very explicit. The only oral instructions which will be given to you will be those at the end, where I shall read to you the form of the verdict, consisting of four questions, which you are going to be asked to answer, and the instructions, which accompany that, relating [1180] to your conduct in the jury room.

As you have already been informed, if, during your deliberations, some question arises in your minds as to the exact wording of the court's instructions, you may have the written instructions, other than the remarks I am making now and the remarks at the end, sent out to you. Of course, the form of the verdict you will have before you at all times. What I have just said also applies to all the exhibits in the case. You are entitled to have them sent out to you. If, after you organize by selecting one of

your number, man or woman, as foreman of the jury, and you make a request to that effect, all the exhibits will be sent to you. I may say that, for your convenience, some of the exhibits which were contained in bulky books, especially one, have been photostated and you will find them in this form rather than in the books. I am merely saying that so you won't be looking for a big bulky book.

For convenience of giving to you the instructions, I shall call from time to time numbers from 1 to 7, as they occur in sequence, and, as I call them, I shall have a phrase such as "Introductory Instructions" or the like. The object of that is to separate the instructions and to call your attention, as well as can be, to the fact that the instructions which follow between any two numbers relate, as nearly as possible, to the same topic. [1181]

Of course, the instructions must be given as a whole and must be studied as a whole, because there are several issues to decide in this case, and you must answer four separate questions, as some principles of law might relate to one rather than to the other. And it is for that reason that I shall designate the various groups as I go along. We do that in cases which present a large number of legal issues, such as this one does.

I.

GENERAL INSTRUCTIONS

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon

the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right, nor shall I exercise it in the present case. I shall leave the determination of the facts of the case to you, satisfied, as I am, that you are fully capable of determining them without my aid. However, it is the exclusive province of the Judge of this Court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given to you by the Judge in these instructions. It would be a violation of your duty for [1182] you to attempt to determine the law or to base a verdict upon any other view of the law than that given you by the court—a wrong for which the parties would have no remedy, because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with those instructions as you have been sworn to do.

You are the sole judges of the effect and value of the evidence. Your power, however, of judging of this effect and value of the evidence is not arbitrary, but is to be exercised with legal discretion, and in subordination to the rules of evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a lesser number or against a presumption of law or evidence which satisfies your mind. In other words, it is not the greater number of witnesses which should control you where their evidence is (not) satisfactory to your

minds, as against a lesser number whose testimony does (not) satisfy your minds. There is an error there in the printed instructions, gentlemen, which you have. "Not" should be eliminated in the last two lines.

In weighing the evidence, you are to consider the credibility of witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. The conduct of the witnesses, their character, as shown by the evidence, their manner on the stand, their relations to the [1183] parties, if any, their degree of intelligence, and the reasonableness or unreasonableness of their statements, and the strength or weakness of their recollection, may be taken into consideration for the purpose of determining their credibility. A witness is presumed to speak the truth; this presumption, however, may be repelled by the manner in which the witness testifies, by the character of his testimony, or by testimony affecting the character of the witness for truth, honesty, or integrity, or by his motives or by the contradictory evidence.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and being convinced that a witness has stated what is untrue, not as the result of mistake or inadvertence, but wilfully and with a design to deceive, you must treat all of his testimony with distrust and suspicion, and reject it all unless you shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth.

The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness or comport with some other fact or facts otherwise known or established by the evidence. You should not consider as evidence any statement of counsel made during [1184] the trial, unless such statement is made as an admission or stipulation conceding the existence of a fact or facts.

Such statements, arguments, comments or suggestions are not evidence and must not be considered as such by you. You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inferences which you may deduce therefrom as stated in these instructions, and upon the law as given you in these instructions.

In a civil case, such as this, the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of evidence. The law does not require a demonstration, that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. The burden is upon the plaintiff to prove his case by a preponderance of the evidence.

Preponderance of the evidence means the greater weight of the credible evidence as you find it to be. Or such evidence as, when weighed with that opposed to it, has more convincing force, and from which it

results that the greater probability is in favor of the party upon whom the burden rests. [1185]

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, and is proved directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not work of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but, unless so controverted, the jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be found on a fact or facts proved and be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

During the course of the trial, I have, at various times, asked questions of certain witnesses. My object in so doing was to bring out in greater detail certain facts not yet [1186] fully testified to by the particular witness. You are not to infer from the questions asked that I have any opinion as to the

facts to which they related. If, from these questions, you have inferred that I have an opinion as to the particular facts to which the questions related, it is your right to treat it as such, and to disregard it in arriving at your own conclusion as to the particular facts or as to other facts in the case. For I repeat: You are not to infer from anything I have said or done in this case that I have any opinion as to the facts in this case which you are called upon to decide, or that I favor the claims or position of either party, or that certain witnesses are or are not to be believed or what inferences are to be drawn by you from their testimony. Any contrary impression you are free to disregard.

II.

THE NATURE OF THE ACTION AND THE CONTRACT

The action is for declaratory judgment and was instituted by the plaintiff, Lester Cole, who was employed by the defendant, Loew's Incorporated, as a writer for motion pictures. Certain facts in this case have been stipulated to by the parties to be true. That means that those facts are established without the necessity of introducing any evidence of them and that they must be accepted as facts by you. The facts so stipulated in this case are in the pre-trial order. There is an error there. The pre-trial order is not an exhibit, [1187] is it?

Mr. Selvin: No, your Honor; it isn't.

The Court: Just strike that out. The facts so stipulated in this case are before you.

The phase of the case with which the jury is con-

cerned relates to the notice served upon the plaintiff on December 2, 1947, which, omitting the date, title, salutation and signature, reads:

“At a recent hearing of a Committee of the House of Representatives, you refused to answer certain questions put to you by such Committee.

“By your failure to answer these questions, and by your statements and conduct before the Committee and otherwise in connection with the hearings, you have shocked and offended the community, brought yourself into public scorn and contempt, substantially lessened your value to us as an employee, and prejudiced us as your employer and the motion picture industry in general. By so doing you have violated your obligations under your contract of employment with us and your legal obligations to us as our employee.

“Accordingly, and for good and sufficient cause, this is to notify you that we have elected to suspend your employment and payment of your compensation under your contract of employment with us dated December 5, 1945, as amended, commencing as of December 3, 1947, and continuing until such [1188] time as you are acquitted or have purged yourself of contempt of the Congress of the United States and you declare under oath that you are not a Communist.

“This action is taken by us without prejudice to, and we hereby reserve, any other rights or remedies which we may have.”

It is the contention of the plaintiff that the defendant did not have the right to suspend him. This contention is contradicted by the defendant, who asserts

that it had the right to suspend under the written contract between the plaintiff and defendant, dated December 5, 1945, and, more particularly, under the clause reading as follows:

“The employee agrees to conduct himself with due regard to public conventions and morals and agrees that he will not do or commit any act or thing that will tend to shock, insult or offend the community or public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.”

Clause (2) of the contract reads:

“(2) The employee agrees that throughout the term hereof he will write stories, adaptations, continuities, scenarios and dialogue and that he will render such other services in the editorial department of the producer as the producer may [1189] request; that when and as requested by the producer he will render his services as a producer and/or associate producer and in such other executive capacity, or capacities, as the producer may require and as the employee may be capable of performing; that he will promptly and faithfully comply with all reasonable instructions, directions, requests, rules and regulations made or issued by the producer in connection herewith; and that he will perform and render his services hereunder conscientiously and to the full limit of his ability and as instructed by the producer at all times and wherever required or desired by the producer. The term “photoplays” as used in this agreement shall be deemed to include, but not

to be limited to, motion picture productions produced and/or exhibited and/or transmitted with sound and voice recording, reproducing and/or transmitting devices, television, radio devices and all other improvements and devices which are now or hereafter may be used in connection with the production and/or exhibition and/or transmission of any present or future kind of motion picture productions."

The clause in the contract under which the notice of suspension was given defines certain conduct. The words used in the clause, some of which are carried over into the notice, are ordinary English words with the meaning of which you are familiar. Some of them, however, should be further defined.

To "shock" means to offend the sensibilities of someone; [1190] to strike with surprise, terror, horror or disgust.

To "offend" is to cause dislike or anger.

"Scorn" means the object of extreme disdain, contempt, or derision.

"Contempt" is the act of contemning or despising; the feeling with which one regards that which is considered mean, vile or worthless.

"Disdain, scorn" would also express the state of being despised, disgraced, shamed.

These words together, when applied to the conduct of a person, describe conduct which reflects on the character of a person and his name and standing in the community and tends to expose him to public hatred, contempt, scorn or ridicule, or which would shock, insult or offend the community.

The conduct must be such that a noticeable part of the community or a class of society whose standard

of opinion we recognize, would be made to despise, scorn or be contemptuous of the person who is charged with such conduct.

In answering the special interrogatories which will be submitted to you, you must determine as to each whether the conduct of the plaintiff in the particular instance referred to, namely, his appearance before the Congressional Committee, was of such character that you, as jurors, can say that, under our American standards of right conduct, it did shock or tend to shock and offend the community and/or brought the [1191] plaintiff, or tends to bring the plaintiff, into public scorn and contempt as herein defined.

The verb "to prejudice" also appears in the clause of the contract by which the plaintiff agrees, among other things, not to do or commit any act or thing that will "prejudice the producer or the motion picture, theatrical or radio industry in general."

The verb "to prejudice" is defined as follows: "To injure or damage by some judgment or action; to cause injury to; hence, generally, to hurt; damage; injure; impair, as to prejudice."

In respect to those words also, you must determine whether the conduct of the plaintiff was such that you, as jurors, can say that, under our American standards of right conduct, which are accepted by the community of which you are a part, it was conduct which would injure or damage the defendant. And, in determining whether it would have such effect, you must consider whether the conduct would be considered an attack or reflection on the reputation of the defendant in its method of conducting its affairs through the employment as a writer of a per-

son who acts as the plaintiff did under the circumstances. Even lawful actions may shock or offend certain persons and subject the persons performing these acts to scorn and contempt. To illustrate: If a man is sued for money owed, he may, even though he has not paid the money, defend the action on the ground that it was outlawed. [1192]

I have made an addition, so I will reread that paragraph. Strike out what I have said beginning with "Even lawful actions."

Even lawful actions may shock or offend certain persons and subject the persons performing these acts to scorn and contempt. To illustrate: If a man is sued for money owed, he may, even though he has not paid the money, defend the action on the ground that it was outlawed, that is, that the suit was not brought within a certain period of time prescribed by law. A person holding high views of business or commercial ethics might be critical of one who makes such a defense. But it could not be said that the community as a whole or a good portion of it would be shocked or offended by the fact or that it would subject the person making such defense permitted by law to public scorn or contempt.

Unless forbidden by State or Federal law, or by the courts as against public policy, an employer might, as a condition of employment, require, in a written contract, that an employee do not perform, during the course of the employment, certain acts which are not in themselves illegal. In such event, the employer might, if the employee violated the condition, during the period and time of employment,

consider it a breach and take whatever steps he may be allowed under the contract.

And in a lawsuit arising from such a controversy, the [1193] only factual situation involved would be whether the designated prohibited act was actually committed. But when, as here, the prohibited conduct is not named specifically in the contract of employment, but is defined as conduct having a certain effect, then the jury is called upon to determine, as you are called upon here, as questions of fact:

1. Whether the conduct was of the character forbidden by the contract; and
2. Whether the employee was guilty of such conduct.

You are instructed that the burden is on the defendant to prove by a preponderance of the evidence sufficient justification, in accordance with the instructions of the court, for suspending Mr. Cole. This means that before you can find that the defendant was so justified or that plaintiff conducted himself in a manner contrary to the morals clause of the contract, you must be satisfied by a preponderance of the evidence that every fact essential to show such justification is true.

Therefore, unless such justification is established by a preponderance of the evidence you must find that the plaintiff did not conduct himself in such a manner as to bring himself into public scorn, hatred, contempt or ridicule, or that his conduct had any of the other effects in the clause.

In considering whether Lester Cole's conduct had such effect, you are not to speculate or to guess. If you are not [1194] satisfied by a preponderance of

the evidence that such was the fact, you are to find that his conduct did not have any of the effects stated in the clause.

In determining whether the conduct of Lester Cole had such effect, or if it had any, you are to consider only the period between October 30, 1947, and December 2, 1947.

An employer cannot penalize an employee simply by claiming a violation of a contract by the employee. In order to justify a claim of violation and a suspension or other penalty allowed by the contract, the employer must show that the employee's act charged as violation was done or committed by the employee and that it was done wilfully and intentionally. Thus, in order to find that the plaintiff so conducted himself as to bring himself into public scorn, hatred, contempt or ridicule, or to shock the community or prejudice the defendant, you must find from all the evidence, and by a preponderance of the evidence, that his conduct, which it is charged had that effect, was wilful and intentional and actually had that effect.

A "wilful" act is an intentional act. It does not necessarily imply any evil intent on the part of an employee or malice on his part. It does not necessarily imply anything blamable, or any ill-will or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. [1195] It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent when he does it. [1196]

III.

THE LAW OF CONTRACTS BETWEEN MASTER AND SERVANT OR EMPLOYER AND EMPLOYEE

You are instructed that where an employment is under a written contract for a definite period which defines the rights and obligations of both parties, the conditions of the contract are binding upon both parties. This means that the contract is the sole measure by which the conditions relating to its existence, continuance and termination of the relation of employer and employee are gauged. And any question relating to performance or non-performance by either party to the contract must be determined by the terms of the contract.

The courts, in interpreting and enforcing contracts of employment, have, however, laid down certain rules pertaining to the mutual obligations of the parties in the performance of the contract.

One of the principles is that an agent or employee is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency or employment.

However, unless the contract of employment specifically otherwise provides, an employee is not necessarily prevented from acting in good faith outside his employment in a manner which might injuriously affect his master's or employer's business.

An employer may consider a contract of employment breached by the employee when the employee fails to perform [1197] his duty under it or breaches the express or implied conditions in the contract,

even though injury does not result to the employer in consequence of the employee's breach. But the reason given for the action must be true, from the standpoint of the employer acting in good faith.

And where the contract specifies the grounds for its termination or suspension, and written notice of such ground is provided for, the employer, in order to justify his action, must show that the ground given in the notice actually existed. If he does not do so, by a preponderance of the evidence, he cannot justify his action upon other grounds named in the contract which, although true, were not stated in the notice.

In performing his duties under the contract, the plaintiff was required to comply substantially with its terms.

To apply these rules to the facts here: The plaintiff Lester Cole was employed by the defendant, Loew's, Incorporated, under a written contract of employment; that contract ran until November 15, 1949, with certain options. Where, as here, an employer suspends an employee during the term of his contract, the law requires that the employer justify that suspension by a preponderance of the evidence. In this case, the defendant having notified the plaintiff that it suspended the plaintiff upon the ground that he so conducted himself at this hearing and in connection with it as to bring himself into public scorn, hatred, contempt or ridicule, it is necessary [1198] for the defendant to prove by a preponderance of the evidence that the plaintiff Lester Cole

personally so conducted himself that he was held in public scorn, hatred, contempt or ridicule, or that his conduct shocked or offended the community or prejudiced the defendant or the industry in general.

IV.

THE ACTS OF THE EMPLOYER CONSIDERED AS WAIVER

An employee has a right to rely on statements of the officers and representatives of a corporation by which he is employed in determining whether a certain course of conduct would violate his obligations as an employee.

If an employer by his words and acts leads an employee to believe that certain conduct by the employee will not be considered a violation of his employment obligations, and the employee, in good faith, acts in such belief, then the employer may not thereafter be allowed to treat such conduct as a breach of the employee's obligations.

If Mr. Cole, in good faith, in this case did come to the conclusion, from the actions and the statements of the executives of the defendant, Mr. Mayer and Mr. Mannix, and you so find as a fact, that Mr. Cole could conduct himself as he thought proper before the congressional committee, assuming that you find such actions took place and such statements were made, you are instructed that Cole had the right to use his best judgment as to what his conduct before the Committee should be.

Or, to put it differently and more explicitly:

If you find that the defendant's executives, Mr. Mayer and Mr. Mannix, performed certain acts and made certain statements, and by such actions and such statements, before [1200] the hearings, led the plaintiff Lester Cole to believe that they were not concerned about charges that he was a Communist, or that he was a Communist—and Mr. Cole, in good faith, relied on such statements and actions in deciding upon a line of conduct before the Committee—but that the defendant's executives afterwards changed their minds, without notifying Cole, before he testified before the House Committee, and gave them—just a minute. Strike out “and gave them”.

I made some changes, so I will start this over again:

Or, to put it differently and more explicitly: If you find that the defendant's executives, Mr. Mayer and Mr. Mannix, performed certain acts and made certain statements, and by such actions and such statements, before the hearings, led the plaintiff Lester Cole to believe that they were not concerned about charges that he was a Communist, or that he was a Communist, and gave him no specific instructions as to how to conduct himself in the matter—and Cole, in good faith, relied on such statements and actions in deciding upon a line of conduct before the Committee—but that the defendant's executives afterwards changed their minds, without notifying Cole, before he testified before the House Committee, and without giving him any specific instructions as to how to act, then I instruct you that Cole had the right to pursue the conduct he had decided upon on

the basis of the [1201] prior acts and statements referred to, if you find them to be true and to have existed, without regard to any later claim or possible claim by his employer that because of his conduct the public might be led to believe that he was a Communist.

In this case, the plaintiff Lester Cole agreed in his contract with Loew's, Incorporated, that he would comply with the provisions of his contract to the full limit of his ability or as instructed.

If you find that the defendant Loew's knew that Lester Cole had been subpoenaed to appear before the House Committee on Un-American Activities, then I instruct you that if the defendant desired that plaintiff Lester Cole conduct himself before the Committee in a certain manner, the defendant Loew's had the right to give reasonable and specific instructions to Lester Cole.

I will read the last paragraph over again, as I have modified it—I will read the whole instruction over again:

In this case, the plaintiff Lester Cole agreed in his contract with Loew's, Incorporated, that he would comply with the provisions of his contract to the full limit of his ability or as instructed.

If you find that the defendant Loew's knew that Lester Cole had been subpoenaed to appear before the House Committee on Un-American Activities, then I instruct you that if the [1202] defendant Loew's desired that plaintiff Lester Cole conduct

himself before the Committee in a certain manner, the defendant Loew's had a right to give reasonable and specific instructions to Lester Cole and that it was his duty to follow them, if they were reasonable, as the contract provides.

You are instructed that even if an employer has the right to suspend an employee under a contract, he may, by his words or conduct, and without reference to any act or conduct of the party affected thereby, waive this right. A waiver is such conduct of the employer as shows his election to forego the right to suspend, which he might otherwise have taken or insisted upon under the contract. Once such right is waived by the employer, it is gone, so far as the particular conduct is concerned, and cannot be claimed by him, except for some other or different violation by the employee.

To put it into a brief sentence: An employer knowing of an employee's conduct which might warrant suspension or termination of employment may not continue employing him thereafter and at a later date treat the employee's conduct as a breach of his obligations.

So, here, if you find that when Cole came back from Washington, Loew's knew of Cole's statements and conduct before the House Committee in Washington in connection with the particular hearings, but nevertheless, put him back to work, and accepted his services with the intention of accepting [1203] Cole as its employee under the employment contract, then I instruct you that Loew's waived the right to rely upon such conduct in taking action against Cole.

V.

THE RIGHTS OF WITNESSES
BEFORE COMMITTEES

You are instructed that you are not concerned with the legality of the existence of the Un-American Activities Committee of the Congress of the United States. You are to assume that it was legally constituted and I instruct you that it was so legally constituted. Nor is the Committee's right to inquire into certain matters before you. You must assume that the right to do so exists, and I so instruct you.

The right of Congressional inquiry through committees is a necessary and legal adjunct to the American democratic process, and fruitful recommendations and legislation have, at times, resulted from such inquiries.

In exercising the right of inquiry, a Congressional Committee may subpoena witnesses and ask them questions relevant to the inquiry. However, a witness examined before the Committee also has rights. He may decline to answer certain questions in order to secure from the courts a final determination of the right of the Committee to ask the particular question. When he does so, he paves the way for contempt proceedings in the courts, and not before the committee, where, that is, in the courts, a final decision as to the power of the committee in the particular respect can be obtained.

When a question is asked of a witness before a committee, [1205] he may give either a direct or an irresponsive answer. If the question is of such char-

acter as to require an explicit answer, he may be directed to give such answer. But he cannot be required to answer in a specific manner and without being given an opportunity to explain his answer. Nor can he be denied the right to amplify it. And there is nothing wrong if the answer which the witness gives goes beyond the question, or is what we call in law non-responsive.

A non-responsive answer, if it includes irrelevant matter, may be stricken. If it contains relevant facts, they are admissible, notwithstanding the fact that they were not specifically asked for or called for by the particular question.

When a witness is called before a Congressional Committee he has a right to invoke the protection of the Constitution and of the laws of the United States, and to that end he has the legal right guaranteed to every citizen or legal resident of the United States to assert rights reserved by the Constitution and the law and to claim their privileges.

In this respect, the Supreme Court has said:

An official inquisition to compel disclosures of fact is not an end, but a means to an end; and the end must be of a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has a right before [1206] answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer.

And before a witness can be guilty of contempt of

a legislative committee two conditions much occur:

1. The questions asked of the witness must be relevant to the purpose of the inquiry, that is, it must be required in a matter into which the committee has the jurisdiction to inquire, and

2. The witness must actually refuse to answer the relevant question.

Or, conversely put:

A witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.

Whether he is right or wrong, and even though he may be subjected to penalties if he is wrong, every citizen has the right to have determined by the courts questions as to his Constitutional or other legal rights. This is one of the privileges and incidences of American citizenship.

I will reread the first sentence, because I have modified the last sentence:

Whether he is right or wrong, and even though he may be subjected to penalties if he is wrong, every citizen has the right to have determined by the courts questions as to his [1207] Constitutional or other legal rights. This is one of the privileges and incidences of American citizenship.

And even the alien in our midst, if he be a legal resident, has certain rights and privileges which he may assert and which it is the duty of a legislative committee to respect and of the courts to protect.

VI.

SOME FURTHER INSTRUCTIONS AS TO
THE RESPECTIVE RIGHTS OF EMPLOY-
ER AND EMPLOYEE

No employer has the right to coerce or influence any of his employees to follow any particular course or line of political action or political activity. However, parties to an employment contract may agree not to engage in certain particular activities at certain definite times. To illustrate: A man has the right to run for political office. But a contract of employment may prohibit an employee from running for office or campaign for office on the employer's time.

The word "political" is defined as follows:

"Of or pertaining to the exercise of the rights and privileges or the influence by which the individuals of a state seek to determine or control its public policy; having to do with the organization or action of individuals, parties, or interests that seek to control the appointment or action of those who manage the affairs of state."

"Politics" is defined as follows: [1208]

"The science and art of government; the science dealing with the organization, regulation, and administration of a State, in both its internal and external affairs; political science. . . . The theory or practice of managing or directing the affairs of public policy or of political parties; hence, political affairs, principles, convictions, opinions, sympathies, or the like. . . ."

VII.

THE QUESTION OF COMMUNISM

In view of the fact that the conduct of the plaintiff which is made the ground of suspension involved his failure to answer concerning his membership in a professional union and in the Communist Party, the court will give you some specific instructions as to the bearing of the question on the problem before you.

You are instructed that in California it is libelous to call a person a Communist. This for the reason that such a charge would expose a person to the hatred, contempt and ridicule of many persons.

At the same time, I instruct you that in California it is lawful for a person to be a member of the Communist Party, and to register with the Registrar of Voters of a county as a member of such party. In California, the Communist Party is entitled to participate in elections, including primary elections, and to nominate candidates. And, while, under California [1209] law, any party which carries on or advocates the overthrow of the government by unlawful means or which carries on or advocates a program of sabotage may not participate in primary elections, the courts of California have ruled that the courts do not take judicial notice of the fact that the Communist Party advocates the overthrow of the government by force or violence, and they have also ruled that a registered Communist is not guilty of a violation of the State law by the mere fact of membership in the Communist Party. You are to bear these facts in mind in judging whether

the conduct of the plaintiff was as charged by the defendant. And, in determining this matter, you are to bear in mind the following facts and additional instructions.

I have stated that in California an accusation of Communism against a person is libelous. This is so because, under California law, every false and unprivileged publication which exposes a person to hatred, contempt, ridicule or obloquy or causes him to be shunned or avoided, or which has a tendency to injure him in his occupations, is libelous per se.

The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit.

In this manner, the law recognizes that men's reputations are "tender things", and presumes that every person has [1210] a good reputation.

For this reason, the law does not require one who has been libelled to prove its falsity. On the contrary, falsity is presumed if the publication is unprivileged, that is, not uttered in a judicial or legislative proceeding or other proceedings protected by law, and is of a character to affect his reputation, such as a charge of Communism is.

The person who libels another has the burden of proving that the charge is true. He who repeats a libelous statement, if he wishes to justify it, must prove not that another has made the statement, but that the statement is true.

These principles should be borne in mind by you in considering the testimony in this case in which reference was made as to certain accusations made

against the plaintiff in certain publications and before the Committee which were repeated and discussed in the presence of some of the defendant's representatives. You were admonished at the time when these accusations were repeated here and I admonish you again now that they are to be considered only as having been made and that no one has proved in this lawsuit that these accusations are true. Indeed, the truth of these accusations is not an issue in the case. And the reason, as already stated, is that the defendant has not charged the plaintiff is a Communist or a member of the Communist Party and that the notice of [1211] suspension involved here does not set forth as a ground of suspension the fact, if it be a fact, that the plaintiff is or ever has been or was at the time of the notice, a Communist or a member of the Communist Party. As you have already been instructed, the defendant, having, in accordance with the contract of employment, specified in the notice the ground on which they relied for suspension, is bound by it. And the only ground of suspension set forth in the notice is the conduct of the plaintiff before the Un-American Activities Committee of the Congress in connection with certain hearings and at the time specified of his appearance before that Committee. All the evidence on the part of both the plaintiff and the defendant has been directed to that conduct. And the question whether the plaintiff is or is not, was or was not, a Communist, is not before you. All you have to determine is whether in not answering in the manner requested by the Committee, the question, among others, whether he was a Communist or

a member of a trade organization, and whether his entire conduct before the Committee in connection with the hearings was of the type forbidden by what has been called the "public relations" clause as bringing the plaintiff into public scorn and contempt, shocking and offending the community and prejudicing the defendant and the industry.

And, in determining this matter, you are to consider all [1212] the evidence and reach your verdict without trying to speculate about the political affiliations of any of the witnesses or parties in this case.

VIII.

CONCLUDING WRITTEN INSTRUCTION

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Your first duty upon retiring to the jury room to begin your deliberation in this case will be to select one of your number as foreman. As you have

already been informed, the jury in federal courts is the common law jury, that is, it requires your unanimity of action. All of you must agree before a verdict can be returned. And in this case, as the [1213] verdict is what we call a special verdict, which merely is a group of questions, which will consist of your answers to four questions, you must all agree on the answers to be given to each question unless a situation should arise where the court should allow you to return an answer to some only of the questions.

The form of verdict to be submitted to you, omitting the title of the court and cause, reads, "Special Verdict. We, the jury, duly empanelled and sworn to try the within cause, hereby make the following answers to the following specific questions:

"Question 1.:

"Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, bring himself or tend to bring himself into public hatred, contempt, scorn or ridicule? (Answer 'yes' or 'no'.)

"Answer:

"Question 2:

"Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, tend to shock, insult or offend the community? (Answer 'yes' or 'no'.)

"Answer:

"Question 3:

"Did the plaintiff Lester Cole, by his statements

and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, prejudice the defendant Loew's, Incorporated, as his employer or the motion picture industry generally? (Answer 'yes' or 'no'.)

"Answer:

"Question 4:

"Assuming that the statements and conduct of the plaintiff Lester Cole, before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, amounted to a breach on his part of what has been called the morals and conventions clause of the contract, did the defendant Loew's, Incorporated, by its conduct towards the plaintiff, subsequent to the hearing, waive the right to take action against him by suspending him? (Answer 'yes' or 'no'.)

"Answer:

"Dated this day of December, 1948.

.....,
Foreman."

As you have already been informed, you are required to give an answer of yes or no to each of the questions and you will do so by following the procedure I shall now illustrate as to one question. If, to Question 1, which [1215] relates to the matter whether the conduct was such as to bring the plaintiff into public hatred, contempt, scorn or ridicule, your answer is yes, you will insert the word "yes" in the blank space above the line adjoining the word "Answer".

If you answer it in the negative, that is, if you

reach the conclusion, upon a consideration of all of the evidence, that his conduct was not such as to bring the plaintiff into public contempt, scorn or ridicule, you will insert, at the place indicated, the word "no". And that applies to each of the other questions. You will insert, through your foreman, the word "yes" or "no" according to the answer you determine should be given to each of these questions. When you have so answered either way, the special verdict must be dated at the place indicated, which I have read, signed by your foreman and returned into this court.

Are there any objections by either side to the instructions given or to the instructions refused? If so, please indicate, in which event opportunity will be given to present such objections outside of the hearing of the jury.

Mr. Selvin: There are objections by the defendant, your Honor.

* * * *

[1216]

The Court: Let the record show that the following proceedings are had, on the instructions, outside of the presence of the jury. I think, gentlemen, we ought to follow the usual procedure and permit the plaintiff to make his objections first, although they did not indicate that they had objections. But, so long as one side has indicated it, there is no such thing as a waiver.

Mr. Selvin: That is perfectly all right and they may state their objections first, but I will object to being jockeyed into the position before the jury as being the only one to make objections. There was

a silence on the part of the plaintiff and I assumed they had none.

The Court: I said I would hear objections by both sides and the plaintiff may have objections. The reason I am assuming it is this. I, like you, noticed the silence but I think the record shows that counsel suggested a recess while they were talking about it, to discuss the matter. I think Mr. Margolis said so and so I assumed there are objections. If not—

Mr. Margolis: The reason we asked for time was we were [1220] not sure. I will say at this time we have none.

The Court: All right. Let's take up first, if you will allow me to do that, the instructions refused, your instructions which you requested and which have been refused, if you have any.

Mr. Selvin: Yes; we have. We will object to the refusal to give defendant's requested instruction No. 7.

The Court: I don't need to make any comment now, gentlemen. Under the law, your objection is automatically allowed and it is to be assumed and the law is that the mere making of the objection gives it to you. I don't have to allow it. It is allowed. If I am called upon to make comment, I will make comment. As to that instruction, I debated with myself whether to give it in that form. I did not think we should choose that one as judicial notice and, properly speaking, an instruction as to the libelous character of a publication to subject one to ridicule and obloquy is not a judicial notice. It is an

instruction on the law and I gave the substance of it in that long instruction on the subject.

Mr. Selvin: I had intended to preface my remarks, your Honor, with the comment that I know that your Honor has given the matter of these instructions a great deal of attention and thought and work. So that I assume all that will be necessary at this time is to suggest particulars with [1221] respect to which we have exceptions.

The Court: That is right. But, if what you say suggests to me a possible modification or calls for a further explanation than is already given, I will be glad to hear it. My mind was in a state of flux until the last moment. As a matter of fact, I have in front of me 16 instructions which, if you will check with the record, you will find I intimated I might give, which I have withdrawn since yesterday, 15 of which I have entirely withdrawn, one of which I modified. And you will note by looking at my manuscript that, even as I went along, I not only made additions but cut out long passages which in the context appeared to be unnecessary. I tried to give a consistent set of instructions, which expressed my ideas of the law and tried to avoid repetition, but in a case like this it couldn't be avoided. If I had about a week to edit these instructions, or if I could give it the time and chisel a phrase in the way I do, with a lot of review of an article, the title of which I have, I would produce a much more polished product and one that wouldn't be inconsistent. So I wouldn't be surprised if you call my attention to something that may change my mind as to what was said or the manner in which it was said. So you are free to do it.

Mr. Selvin: Referring, first, your Honor, to the subdivision of the instructions which was numbered II, that [1222] is, the nature of the action and the contract, the instruction in that subdivision which told the jury, in effect, that they must be able to say that, under our American standards of right conduct, the plaintiff's conduct and his appearance before the Committee must be shown to shock, offend and insult the public and bring himself into public scorn, contempt and so forth, our objection to that particular instruction is that it requires the defendant to show that the conduct had the effect and not merely, as the contract provides, that it had the tendency to produce that effect.

The Court: The word "tendency" is used as to both in the first clauses. It is not used, as to the third clause, to prejudice, because the presence of the comma in front of that indicates that the prejudice is limited in that manner. And in the manner in which I worded the question you will note that I used the word "tend" wherever it occurs in the contract. I used it in Clause (2), whether it would tend to shock, insult or offend. Then, in Section 3, I limited it to prejudice—where is the complaint? That is an important question. That is Clause 5, isn't it?

Mr. Selvin: Yes, your Honor.

The Court: I studied that clause with all of the linguistic assistance I could get from dictionaries and things like that.

Mr. Selvin: You will note that "tend", "tend to degrade [1223] him in society," but in the next one it says, "bring him into public scorn, hatred and contempt. There is no separation by punctuation

from the commencement of that clause, which begins with the word “tend”, and, if the presence of the comma is to be given to separate “prejudice” from the word “tend”, then the absence of the comma in that particular should have the opposite effect, we contend.

The Court: All right. Let me take a look at that. If you are right, I will correct it and give them an additional instruction and give them a special instruction that—if that had a tendency to do that—but I think you are in error; that I have done that. I think you are in error, Mr. Selvin.

Mr. Selvin: I just wanted to say that the same objection recurs throughout other parts of the charge and in Question 1, the proposed special verdict.

The Court: I think you are right but I call your attention to the fact that these words, coming after I finish “shock or offend”, when applied to the conduct of a person, describes conduct which reflects on a person and his standing in a community and tends to expose him to public hatred, scorn or contempt or to offend the community. So there I use the word “tends” as to public hatred. You may be right that it is absent from that clause and, if so, I should be glad to change the clause there by putting the word “hatred” in. [1224]

Mr. Selvin: In the same subdivision of the charge, that is, Subdivision II, where your Honor is instructing upon the proposition that lawful action may sometimes shock or offend some people, and using the statute of limitation as an example, our objection to that as given and particularly in connection with the example is that it carries the im-

plication that, if Mr. Cole's conduct was lawful, it could not be a breach of this contract.

The Court: I think, as a matter of fact, if you see the editing, you will not how much I wrote. All of the pencil notations here were written while I was reading the instructions. All of the changes I made before I got on the bench were typewritten and the instruction retyped. Right after that and as a part of it and as it occurs on there, I say, "Unless forbidden by State or Federal law, or by the courts, as against public policy, an employer might, as a condition of employment, require, in a written contract, that an employee do not perform certain acts which are not in themselves illegal"; that he do not perform in the course of employment, certain acts. As I read it, I forgot it was corrected but here I repeated the words. I will read that again. "Unless forbidden by State or Federal law, or by the courts, as against public policy, an employer, as a condition of employment, require, in a written contract, that an employee do not perform, in the course of the employment, certain acts [1225] which are not in themselves illegal. In such event, the employer might, if the employee violated the condition, during the period and time of employment, consider it a breach and take whatever steps he may be allowed under the contract." So I gave both sides and, furthermore, later on in the instructions, I came across the same proposition. So I amplified it by this instruction, which, of course, is a part of it. I repeated it again in Paragraph VI, which is entitled, "Some Further Instructions as to the Respective Rights of Employer and Employee," and you will note that

I practically doubled the instruction as I went along, and this is what I said, "No employer has the right to coerce or influence any of his employees to follow any particular course or line of political action or political activity. However, parties to an employment contract may agree not to engage in certain political activities at certain definite times.

"To illustrate: A man has the right to run for political office but a contract of employment may prohibit an employee from running for office or campaigning for office on the employer's time."

So throughout this there is emphasis upon that right. I have before me the possible intention of giving the entire definition of the type of action, that employers and employees might agree, and one section of the Code was that you cannot prevent a man from running for office. [1226]

I used that as an illustration because I felt it was a good neutral ground on which to pivot this instruction. So I feel the jury has before it both phases of the question. Had I not illustrated it here, you might say that the instruction was one-sided but I illustrated it in one part in one way and in another part in another way, so that the jury might have before them the legal proposition that parties to a contract may agree to their doing something which is not illegal, and I illustrated the proposition in that manner.

Mr. Selvin: To go on to the next point, still in Subdivision II of the charge, where your Honor was discussing the burden of the defendant to prove jurisdiction, we object to that instruction because in the form given it leaves to the jury not a question of

whether the facts claimed to constitute the justification occurred but whether or not there was justification as a matter of law.

The Court: I don't think so. That merely changes the burden and ultimately they are told further on in the instruction that, determining that and not any other issue, they are to consider all of the evidence in the case. It is impossible in each instruction to put in modifiers that would weave every element into it. The jury have been told that, before they find any particular fact, they must be satisfied by the evidence. The mere fact that in one instruction I told them the burden of justification is on their part does [1227] not take away from the instruction I give later on that the entire answer to any of the questions must be based upon the evidence as a whole. In fact, at the end of the long instruction which gives the respective positions of the parties, I say that, "in determining this matter, you are to consider all of the evidence and reach your verdict without trying to speculate"—we are talking about Communism—"about the political affiliations of any of the witnesses or parties in the case," and that injunction is repeated time and again throughout these instructions. All right. What is the next one?

Mr. Selvin: In the immediate following matter on which your Honor touched, to the effect the jury should not speculate as to whether Cole's conduct had the effect claimed for it but must determine it from the evidence, the instruction in the form given we contend carries the implication that what they must determine is whether it actually had that effect and, therefore, eliminated the proposition that

it was sufficient if it tended to have that effect. I am referring, of course, to the question of whether it shocked or offended the community.

The Court: The verb "tend" doesn't modify that. Let me look again at the instruction. I think the question puts it in and I may reread a portion of the instruction in order to emphasize the fact that both as to the effect of the "tendency"—[1228] I do not want to deprive you of the "tendency". It was not my intention to do so. If I did on the first one, it was because I so interpreted the law, and I think that you may be right and I am going to change the first question and so inform the jury and put the word "intent" as to Question 1. In Question 2 it is already there, but, to make sure, I will read, in conjunction with Question 2, the portion of the instruction I have indicated, where I have added the words "it did shock and offend or shock or tend to shock or offend the community." I have added that part of the instruction and I will reread it. I am taking the same view you are taking. I know you are not making these objections just to make a record and, because I do not think such, I am taking the trouble of indicating to you wherein you are right as you go along. All right.

Mr. Selvin: Again, in Subdivision II and immediately following the portion of the charge to which we have just referred, there was an instruction limiting the jury's consideration as to the effect or tendency of this conduct to certain dates, October 30th to December 2, 1947.

The Court: That is right.

Mr. Selvin: We object to that limitation upon

the ground that the tendency of the conduct and its effects upon the employer are persistent things and which persist beyond that period and, since there is being submitted to the jury [1229] the question of justification for the notice of suspension, which, of itself, has not definite date, we are entitled to have the jury consider whether or not the grounds for the suspension persisted for the period of the notice.

The Court: That is a question of law. That limitation merely says that the conduct with which we are concerned is the conduct between those dates; in other words, they have been told that the cause must have existed as of that time. I agree with you that the conduct is continuous but any unforeseen effect that didn't exist at the time couldn't be a special ground. And that was a very brief instruction, the way it read, in determining whether the conduct of Lester Cole had such effect, or, if it had any, you are to consider only the period between October 30, 1947, and December 2, 1947. There may be a little ambiguity there, I agree. [1230]

The Court: I will modify the instruction and reread it and emphasize that this merely means that the cause must have existed at that time. If it did exist, then you may consider whether it continued after the date of the notice.

Mr. Selvin: I believe that obviates our objection.

The Court: All right. I am willing to learn at all times, Mr. Selvin, in this case as in other cases and, when requests are reasonable, when suggestions are reasonable, I haven't any pride of office.

Mr. Margolis: Your Honor, may I inquire as to

the procedure? We have something to say on these matters. Do you want us to wait?

The Court: Yes, you wait. Yes. I will wait.

Mr. Selvin: You mean objections?

The Court: There is nothing to wait. This is not a brief or argument, re-arguing the case, you know. I am indicating as to some of the changes to be made. Then, I will hear you later on, briefly, as to whether the changes should be made. You haven't indicated now that you have no objections otherwise. These are new things as to both. Proceed.

Mr. Selvin: Immediately following that portion of the charge which we have just discussed and where your Honor was instructing the jury—

The Court: Just a minute. There is one thing before [1231] we go ahead. Let me see. All right.

Mr. Selvin: I say in the portion of the charge immediately following that just discussed, relating to the necessity that the conduct on the part of the employee be willful and intentional, there is a statement that before the jury can find in effect an answer favorable to the defendant's contention, that they must find that the conduct was willful and intentional and actually had the effect referred to, being the effect of shocking and offending the public, and so forth, and again we say that—

The Court: I think that is one I rewrote and rewrote many a time. Let me find it, please. Let me take a look at it. Just a minute. Oh, yes. Let me see. I did so much editing, you see, of this, that I read in a clause which isn't in the typewritten portion. So, I am going to reread that because you see, after making the changes—"thus, in order to find that the

plaintiff so conducted himself as to bring himself into public scorn, hatred, or ridicule, or to shock the community or prejudice the defendant," you see what I was doing, as I had it written, I had to consider three horns of a dilemma—this dilemma has three horns—I made this change and I put in "or to shock the community or prejudice the defendant, you must find from all the evidence, and by a preponderance of the evidence," you see, "that his conduct, which is charged had that effect, was [1232] willful and intentional." So that phrase is not there. I had written it and erased, you see, and then evidently for once my eyesight was too good and I read the dim outline which I intended to erase, so I am going to reread this and eliminate that clause. All right.

I merely indicate what my intention is, now, subject to changing my mind in the light of any suggestions of counsel.

Mr. Selvin: Now, your Honor, as to subdivision 3 of the charge—

The Court: Just a moment. Just one minute; while we are talking, I have to be going in and preparing the new form of the question so as to be ready.

Mr. Selvin: And in that connection, may I call your attention to the fact that in question I the various types of conduct are recited in the conjunctive, whereas the contract recites them in the disjunctive.

The Court: You see, gentlemen, that was rewritten so many times, and if any mistakes have crept in, I am sorry. "or", didn't I put in?

Mr. Selvin: No. It is "and" in the copy which we have.

The Court: Yesterday's copy was changed. The copy I gave you this morning—

Mr. Selvin: Yes, yesterday's copy had "or", as I recall it, but this morning's copy has "and".

The Court: I left that up to my secretary.

Mr. Selvin: Mr. Rudin says I am wrong. Yesterday's copy had "and" also.

The Court: Well, it should be. You are right about that.

Mr. Selvin: Now, since your Honor is rewriting a special verdict, I might properly call attention to our objection to question 4, at this time, so that if there is anything in them that your Honor desires to adopt, it won't require a further rewriting.

The Court: No. I am satisfied that that question should be submitted. I worded that very carefully. I wrote it and rewrote it several times and I think the question should be submitted to the jury because it is an issue which I have covered by instructions, the question of waiver, it was argued to the jury, and it should go in as an alternative condition and I have worded it in such a manner that it can be answered yes or no, regardless of how the first three questions are answered.

Mr. Selvin: Well, we have indicated heretofore our objections.

The Court: Yes, you have indicated your objections to the problem. I think this is properly before the jury.

Mr. Selvin: But we do have some specific objections to the language, if the question is going to be submitted.

The Court: State or indicate them now. [1234]

Mr. Selvin: We think the use of the words "amounted to a breach" in the context of that instruction leaves the matter of breach as a matter of law to the jury.

The Court: I merely avoided repeating again all the three clauses which are before you. If you have a better phrase, I will adopt it. You must remember, gentlemen, we are talking to the average American jury and it is a very complex case, and a case involving complex and difficult questions of law, and we have to do our best to put them in simple language and, of course, the language should state plainly to them what is sought. But, the only alternative to using that—as a matter of fact, this is favorable to you, because I cover any delinquency in 1, 2 or 3 by one word, "breach".

Mr. Selvin: My suggestion is to avoid the implication that the jury may determine as a matter of law whether there was a breach or not.

The Court: No. As a matter of fact, I hated to use it, because I have told them throughout—because I avoided any question of breach of the contract, because we are not submitting that to them as a special verdict. Well, how shall we put it in? Shall we put it "a violation of what is called the morals clause"?

Mr. Selvin: My suggestion is simply that if they answer any one of the preceding questions "yes", then—

The Court: No, no, no. I would not adopt that. They [1235] wanted me to do that, too, but I don't want to submit it in that manner, because I want to submit it broadly so they can answer yes or no

regardless of how they would answer the others, without there being any inconsistency. Yours would cause an inconsistency. I tried to avoid that. That isn't the point.

Mr. Selvin: Then a later point in question—

The Court: Now, I think I have found a better phrase by making it read this way:

“Assuming that the statements and conduct of the plaintiff Lester Cole before the House Committee on Un-American Activities in connection with the public hearing held by said committee were forbidden by what has been called the public morals and conventions clause of the contract, did the defendant Loew's, Incorporated”—now, we don't use the word “breach” and we have told them that they have to determine whether it was not permitted, or forbidden. The use of the word “forbidden” doesn't imply any question of law.

Mr. Selvin: Our objection to that would be that it submits the construction of the contract to the jury. The construction of the contract is a question of law.

The Court: It is the first time that you have paid me that compliment, in stating that you are desirous to have any point of law decided by me rather than by the jury. [1236] I accept the compliment.

Mr. Selvin: I have never contended in this case that the construction of the contract, as distinguished from the determination of questions of fact with regard to the contract, is not a question of law.

The Court: That is the first time that you have intimated that there was any question of law to be

determined by me, if the facts are as you claim. All right, let us go on. Let us avoid the comments. Let us not use "forbidden". But I want the form of these not to be objectionable to either side. Wait a minute.

Well, the only way of doing that is to start and read it in again, and that will make the sentence very long.

"Assuming his statements and conduct were such as tended to degrade him in society," and so forth, you will have to put in all four phrases and that will make that a sentence of nearly a hundred words.

Mr. Selvin: It is possible to say something to this effect: Did the defendant Loew's, Incorporated, waive the right to take action against Lester Cole or waive the right to take any action with respect to his conduct?

That is the ultimate question, after all.

The Court: I think that could be achieved—in fact, I think that could be achieved by just using the last portion and leaving out the assumption which doesn't tie it to the [1237] question, did the defendant Loew's, Incorporated, by its conduct towards plaintiff, waive the right to take action against Cole by suspending him. If you simplify it in that manner and then not tie it, it would read this way:

"Did the defendant, Loew's, Incorporated, by its conduct towards the plaintiff, waive the right to take action against him by suspending him?"

"Answer: 'Yes' or 'no'."

And that does not tie it to the past. They can

answer that either way, regardless of how they answered in the past.

This shows the wisdom of the old maxim that two hands can wave more than one and three of them much more than one.

I am inclined to think that that would be a solution that would give us a simple question. I think you had it that way, you had two alternatives in yours. I won't take the time to look at it.

Mr. Selvin: While counsel are conferring—

The Court: Well, gentlemen, of course, counsel can go to lunch, but Mr. Selvin can hold the fort while Mr. Walker goes to lunch. I wish I had the time, I would go to lunch myself. The case being over, I might take all of you to lunch at the same club. I think you belong to the same club. I think Mr. Selvin does, too, but the case isn't over.

But I think that is the solution of the problem.

Mr. Margolis: The only thing that concerns us about [1238] that is whether there is any implied assumption there that that sort of a right does exist. The ensuing language indicates that that question doesn't intend to indicate any idea on the part of the court that such a right did exist. Now, if there is such a right, then there ought to be an instruction along with it that no such assumption is intended to be included in the same question.

The Court: Well, that brings you again into tying it to suspension. Of course, the right to suspend does exist if the cause of the suspension is the one provided in the statute. All right, I think you are right. I think that brings that language in.

Mr. Margolis: Before your Honor has that type-

written, may we comment on other phases of that?

The Court: You said you have no objection. I don't want to start in now.

Mr. Margolis: We have objections only to the changes, your Honor.

The Court: Well, the only change I am making is "tend to bring". I think they are right and I think that should be in, because their instructions are based on thoughts. The only thing I put in there, on line 22, after "bring himself" I say "bring himself 'or tend' to bring himself into public hatred, scorn, or ridicule," that is the only change. [1239]

Mr. Margolis: That is the matter we would like to be heard on.

The Court: All right, go ahead. I will hear you.

Mr. Margolis: Your Honor has said that in this case the question is whether or not the facts set forth in the notice have been sustained.

The Court: That is right.

Mr. Margolis: Now, the matters alleged in the notice do not necessarily have to be as broad as the rights which the employer could claim under the contract. If the employer chooses to rely upon a narrower ground than he might have relied upon under the contract, he is limited by reason of the notice to that narrower ground. And if we look at the notice, the notice doesn't say anything about "tend to". It says that:

"By your failure to answer these questions, and by your statements and conduct before the committee and otherwise in connection with the hearings, you have shocked and offended the

community, brought yourself into public scorn and contempt, substantially lessened your value to us as an employee, and prejudiced us as your employer”—

The word “tend” is nowhere in the notice.

The Court: Yes, I so understand that. In one of the early discussions in this case, I made the observation that [1240] counsel by choosing certain words had sort of waived the others.

A further thought leads me to the conclusion that the language of the notice must be construed in conjunction with it and the notice is not required to be given, that notice of termination need not be couched in legal language, although I assume that lawyers prepared this and that by giving the substance of it, they have not waived an adjective. In other words, I did not express myself before. I agree with you that if they eliminated an entire phrase, such as “to shock the community”, it might be well argued that they intended to leave that out. But, where they have given it, you see, then they are not to be deprived of the wording of the clause which says that the conduct is bad if it has a tendency, because we are talking about the same thing and the question for the jury is—you see, that is the difficulty of instructing the jury in a case like this—If this had said, “If you get married or run for office or make a speech before a group which I don’t approve of,” we would have something concrete to go before the jury, we would say, now, does this conduct have that effect. But this clause is a broad clause and therefore as I told the jurors—that is why I took the trouble—you gentlemen don’t realize the time that it took to write

that instruction, giving them that. If either of you object to that, my [1241] pride is going to be terribly hurt, because it is one instruction which I think is very pithy (that is an old-fashioned English word, it is a biblical word), in which I state as ordinarily, as I started in to say, in a lawsuit arising over such a controversy, the only factual situation would be whether the designated prohibited act was actually committed, but when, as here, the prohibited conduct is not named specifically in the contract of employment but is defined as conduct having a certain effect, then the jury is called upon to determine, as it is called upon here, two questions of fact as questions of fact: (1) whether the conduct is—

So I do not think that by that they have waived their right to argue that it may have a tendency, and I have so worded the instructions.

Mr. Margolis: May I say this your Honor, that although we had this objection, we decided not to make it, because we felt that actually there isn't too much difference between the two, but what we are afraid of at this time, and we believe it is a legitimate fear, is that by these revisions and by these changes in the instructions which, if they had been given originally in the context, we think would not have materially—would not have in any way affected the jury's understanding of this, that the giving of these matters, that the indicating of these changes, after the instructions [1242] have been completed, will have a tendency of emphasizing a point which, if it had been given in the original instruction, would have meant very little and will tend to override and to destroy the effect of other instructions. Now, this

was what we are very, very much concerned about, your Honor. And we think this is what can and will happen as a result of making changes, which if they had been in the original instructions, would have made no difference.

The Court: All right, I will say this: The way I do that, to avoid that situation, I do not tell them what change I have made. I merely say that certain instructions heretofore read have been modified and I am reading now the form in which those instructions are. And then I will tell them about these, that we have changed the questions "and the questions now read as follows:", and I will read them again and I am not going to discuss with them what changes I have made.

You see, I have had too long experience with juries. And then these changes that I make I will have rewritten, right now, and then read the entire instructions as a whole and they will go in at the proper place to be filed with the clerk. All right.

Mr. Selvin: I am still on the subject of question 4, your Honor.

The Court: Yes. [1243]

Mr. Selvin: The conduct of the defendant which brings about a waiver we think should be limited to conduct occurring subsequent to October 30th. Conduct prior to that date might be a basis of estoppel which certainly has not been pleaded or claimed.

The Court: Well, as the question stood, before, it wasn't necessary to modify that, but in fact I started to write, "Did the conduct of the defendant Loew's"—of course in the instruction I have emphasized that—"by its conduct toward the plaintiff

subsequent to the hearing"—that was not necessary in the other question, but it is necessary now, and I think it is a good suggestion.

Mr. Katz: By keeping him in its employ.

The Court: No. That wouldn't be fair to you, because that isn't the law. "By continuing", that would deprive you of the argument that you made and that Mr. Kenny made, that they may draw some inference from the fact that they used his product afterwards, and if I tie it to one, then you are confronted with Mr. Selvin's argument that they had the right to the product anyway, whether they discharged him or not. You see, you are not deciding this case. The thing was cross-sectioned. [1244] Mr. Justice Douglas spoke of "deciding this case in your 57 categories that you tried to establish, much to our sorrow and grief in selecting juries."

Mr. Margolis: Would your Honor indicate the change he made? I did not quite get it.

The Court: I can't stop now. I merely put in the words "or tend to," that is all. I will have a copy for you as soon as it is rewritten. If we have to rewrite it again, we will do it.

Mr. Selvin: Under Subdivision III, the first instruction given, to the effect that the contract is the sole measure of the rights of the parties in effect, supplemented by a statement of what I assume is the restatement rule as to the duty of an agent—

The Court: No, but you omitted a paragraph. I said, however, that courts, by interpreting, have laid down certain rules pertaining to certain mutual obligations of the parties in the performance of the

contract, and then I read two portions of your statement in relation to it.

Mr. Selvin: I just came to that. I am just merely describing the particular instruction so that the record will show to what my objection relates. My objection is that it is not made clear in that instruction, that notwithstanding the contract there may be certain implied obligations or certain duties inherent in the employment which the employee has, [1245] and that while action in good faith on matters not related to the employment may not be a breach of the contract, that there are also situations where such act may be availed of as being a breach of the contract.

The Court: That is stated later on. It is not necessary that it be in every instruction. Otherwise we will have a treatise. They are too complex as they are.

Mr. Selvin: The next one I propose to take up in the charge, which I think follows the one just discussed, is where you refer to the fact that where the contract specifies or requires a written notice—

The Court: That is right.

Mr. Selvin: —the justification must be confined to the grounds specified. Our objection, in the first place, is that if there is in fact a justification, the employer's good or bad faith is immaterial, whereas, this instruction requires good faith.

Another objection is that the instruction is inapplicable to the facts of this case because the contract here does not require a written notice of the grounds of suspension.

The Court: Well, the fact that written notice was

given in this case brings the rule in. The first portion is taken from *May vs. New York M. P. Co.* The other is from *Corpus Juris Secundum*, and I read to you the clause in one of the instructions. [1246]

Mr. Selvin: And the general objection to it is that we take the position that we can justify on any of the grounds which actually existed at the time whether known to us or otherwise.

The Court: You can argue that to someone else, because I am satisfied.

Mr. Selvin: Then, in that same subdivision where your Honor states that the application of those rules to the facts require certain findings—

The Court: Yes.

Mr. Selvin: —our objection to that portion of the charge is that again the tendency of the acts to have the effect is eliminated and it is their actual effect which is—

The Court: No. I am sorry. You misconceived that and I am not surprised, because I changed it myself. You see, the way I worded it covers it. I say in this case, the defendant having notified the plaintiff that it suspended him upon the ground that he so conducted himself at the hearing in conjunction and in connection with it as to bring himself into public scorn, hatred, contempt or ridicule, it is necessary for the defendant to prove by a preponderance of the evidence that the plaintiff Lester Cole so conducted himself that he was held in public contempt, public scorn, hatred, contempt or ridicule, or that his conduct shocked or offended the community or prejudiced this defendant or the industry in [1247] general. The reason why I adopted that phraseology,

is to avoid a phrase such as the one that you objected to in question 4. Otherwise, it wasn't necessary. And I couldn't in every one of them put in every shield. I think the entire tendency there is there. I mean it is summarizing it. Otherwise, I would have to say again that this charged conduct had the effect claimed in the notice, that it had that effect or tended to have that effect. This one is much better than the abbreviation. I think this was exactly the language of the clause.

I will think about this and see—maybe I will modify it by putting a phraseology on it. [1248]

The Court: All right. Go ahead with the next one.

Mr. Selvin: Subdivision IV, the acts of the employer considered as waiver. There are certain general objections which we have to apply to the entire subdivision, first, that it permits the jury to consider, on the question of waiver, conduct or alleged conduct of the defendant occurring prior to the hearing.

The Court: No. This section deals with two things. First of all, it deals with inducement—the first four pages deal with statements before he was before the Committee and the second deals with waiver proper. I designated them as one. I gave the fact of conduct which induces him to act in a certain manner. The only instructions I give as to conduct are three very short ones which specifically refer to conduct after; in fact, I summarize it in one sentence; that an employer, knowing of an employee's conduct which might warrant suspension or termination of employment, may not continue employing him and thereafter, at a later date, treat a plaintiff's conduct as

a breach of his obligation. And then I emphasize it by saying, "So here, if you find Mr. Cole came from Washington, and so forth, and Loew's knew of his statements and conduct before the House Committee in Washington in connection with the particular hearings and, nevertheless, put him back to work and accepted his services," and so forth. All right. The next one. [1249]

Mr. Selvin: In so far as conduct prior to the hearing is instructed upon in this subdivision, it, in our opinion, is relevant, if at all, only on the theory of estoppel and the jury has not been told the elements of the law of estoppel.

The Court: I don't think it is necessary to give any more detailed instructions. Furthermore, neither side has given me any instructions on that and, while I am supposed to do my own work as nearly as possible, neither of counsel having given me any instructions, I don't feel that a discussion of estoppel is concerned. I am merely stating a particular fact and I have given the elements of the fact that, if he thought and acted in good faith, he was allowed to use his own judgment; he had a right to use his own judgment. What the fact would be I have eliminated. I merely say he had a right to use his own judgment. It is for them to determine whether he did or not. That sufficiently covers the law. All right.

Mr. Selvin: Our third point is that neither estoppel nor waiver was pleaded or made an issue in the case.

The Court: I think I already answered that, that, with this declaratory judgment, both of these matters are in issue. I did not want to call them by any word

except the word "waiver". I think the issue has been tendered both of authorization for the act and, second, waiver afterwards. [1250] I don't want to use the word "estoppel" and, this being this type of case, I am warranted in submitting that matter in that form.

Mr. Selvin: Our fourth objection is that, in so far as waiver is concerned, the jury has not been instructed that waiver is a question of intention and has not been told that, before one can be held to waive it must appear that, with knowledge of his right, he took certain conduct and intended to waive that right.

The Court: They were so told because I copied the very wording of the decision in the Estate of Hein.

Mr. Selvin: And we object also to this portion of the charge upon the ground that the jury has not been told that the burden of proving the particular matters therein referred to, by a preponderance of the evidence, is upon the plaintiff, whereas, the jury has been told that justification must be proved by the defendant by a preponderance of the evidence.

The Court: Let me take a look at these instructions again. All right. Go ahead.

Mr. Selvin: Still on Subdivision IV, we object upon the ground that the instruction singles out for specific mention the testimony of Mr. Mayer and Mr. Mayer's and Mr. Mannix' statements to Mr. Cole before he left for Washington, leaving unmentioned the statements of Mr. Mayer and of Mr. Johnston in a similar connection, which it was testified he heard before he took the stand. Again, on Subdivision IV— [1251]

The Court: I intended to eliminate the reference to Mr. Mayer or Mr. Mannix but, in checking the transcript, I found that those are the only statements on which there was any reliance, not as a waiver. Those are used only as to authorization in advance. In the other instructions we are discussing now, on waiver, I have not singled them out. I talk there about employment generally in anything else. These questions occur in the portions which deal with authorization.

Mr. Selvin: It is also the testimony of the meeting at the Shoreham, which apparently was relied on in plaintiff's—

The Court: I have not singled them out. I think you are in error there. All right.

Mr. Selvin: We also object to that portion of the charge upon the ground that it makes the determining, or one of the determining, factors the question of whether Mr. Cole, in good faith, assumed that he was free to act and leaves out of consideration the question of whether he was justified in so assuming on the basis of what was told him or he heard.

The Court: I think the instructions read as a whole emphasize the fact that they must be of a character that he had the right to rely on them and did, in fact, rely on them. In fact, those were the additions I made and I emphasized they must find these elements as a fact, where I say if Mr. Cole, in good faith, did come to the conclusion from the actions [1252] and the statements of the executives of the defendant, Mr. Mayer and Mr. Mannix, if you find as a fact, and so forth. All right.

Mr. Melvin: Then, in this same subdivision, where

your Honor has charged the jury that the defendant knew Mr. Cole was subpoenaed, and if it desired any particular line of conduct on his part, it had the right to instruct him, we object upon the ground, first, that the instruction as given carries the implication that, if they did not give him any instructions or directions, they waived any right to complain of his conduct afterwards—

The Court: That is not the case because later on the modifications are put in. As I said before, I can't transpose into the instructions all of the elements that might go in because it would take twelve Harvard graduates to understand the instructions. The instructions as a whole merely say they had a right. As it stands, it correctly states the law and the modification you suggest is contained elsewhere.

Mr. Selvin: And, second, in respect to that same instruction, upon the ground that, in our opinion, an employer does not have the right to instruct an employee as to how he shall testify before a Congressional Committee. [1253]

The Court: All right. If he doesn't have the right, all right.

Mr. Selvin: If we had the right, the legitimate conclusion would be that we could tell him to testify falsely or in any way we desired.

The Court: Let's not argue that.

Mr. Selvin: I wasn't arguing. I was replying.

The Court: I have never heard any such statement made in the argument that you have no right to tell him if you wanted to. I think the statement I made is correct.

Mr. Selvin: Then the concluding instruction in

that subdivision we object to upon the ground it is not only a formula instruction which eliminates certain essential elements necessary to reach the result but it is, in view of the undisputed facts in the case, in effect, an instruction to return a verdict in the plaintiff's favor and particularly in that it eliminates from the consideration of the jury the proposition that the mere fact that the employee may be retained for a period of time after the alleged violation occurred does not in and of itself necessarily constitute a waiver, and because it further eliminates from the consideration of the jury in that regard the proposition that the conduct here complained of is a persistent conduct and continued, as we contend, up to and beyond the time the employer took the action complained of by the plaintiff. [1254]

The Court: I am of the view that this instruction correctly states the law and gives all of the elements that they may consider and it is not any indication of how the verdict shall be returned.

Mr. Selvin: Subdivision V of the charge—

The Court: Before you begin, I want to say this. I will not interrupt you and I will let you state fully your objections, but I want to state that the settlement of the instructions is the result of so much work, and states the law as I found it in a decision of the Supreme Court and in Wigmore, that I am going to make no comment because comment on my part would be a waste of time, because I correctly stated the law as I found it, and in two instances I actually quote from decisions of the Supreme Court, and I do not propose to make any changes in these instructions. So I will let you make the objections

without interruption on my part. This is a long case and it is the type of case which, decided either way, will go higher, and it is very important in a case of this character, where the views of the court are scattered through various places, that the court have control over the record. You gentlemen might say the record shows certain things; that something that seems very important to me may not come in.

I think this group of instructions and the instructions on Communism fully state my views, and I am so satisfied with [1255] their correctness, that they speak for themselves, that I do not need anything in defense of them. So you may now, without interruption, state your objections to these groups of instructions; and, if what you say suggests a modification, I will say so at the end.

Mr. Selvin: The objection which extends to all of Subdivision V is that it is irrelevant to the issues of fact to be submitted to the jury. The question for the jury to determine is whether or not the conduct complained of occurred, and in the form it is now to be presented, whether or not, if it occurred, the defendant has waived its rights in respect to that. The question of what the plaintiff's rights before the Committee might have been are not involved in the question of whether the conduct had the effect complained of and, if so, whether it has been waived.

We object further upon the ground that, whatever may be the technical description of the right or power of a person to precipitate a legal test by refusing to answer a question before a committee, the fact that a refusal to answer a pertinent question is a criminal violation of the law of the United States and is not

included in the discussion of the rights of witnesses and it should be included if the subject is to be fully stated at all.

The Court: I have stated that the refusal may subject them to contempt, whether contempt is an offense or not, and [1256] the jury are sufficiently instructed that contempt proceedings may be instituted. And there was some stipulation as to when there could be contempt and I gave the jury instructions during the course of the trial as to how those are instituted, and neither of you suggested any instructions, and I believe what was said during the course of the trial is sufficient, along with the reference to contempt, to indicate that a man may be prosecuted in order to determine whether he was warranted in answering or not. As a matter of fact, I say that he may decline to answer in order to test it before the courts. I don't have to say how he has to test it. All right.

Mr. Selvin: We object further to that subdivision of the charge on the ground that as given it, in effect, submits to this jury the legal question as to whether or not what Mr. Cole did was a contempt of Congress as distinguished from the question as to whether or not his conduct, whether lawful or unlawful, had the effects contended for it.

The Court: That is contained elsewhere and I can't repeat it in every instruction, in 60 pages of instructions that took nearly two hours to read.

Mr. Selvin: And we object to the instructions defining political activities and politics upon the ground that the question of what his politics or

political activities were is irrelevant to any issue of fact which is to be submitted to [1257] the jury.

Subdivision VII of the charge, the question of Communism—we object generally to so much of the charge as does any more than tell the jury that it is a fact, which the court will judicially notice, that there is a noticeable segment of the population of this country who look with scorn, contempt, hatred and ridicule, upon the Communist Party and its sympathizers. Beyond that, any instructions as to the law of libel, the burden of proof in libel cases, the question of privilege and libel, the burden upon the alleged defamer or any other person to prove the truth of the charge, are all matters completely extraneous to any issue in this case.

We further object to so much of that portion of the charge as tells the jury that the defendant has not charged the plaintiff with being a Communist, and call attention to that respect to the fact that the notice imposed as a condition of reinstatement a declaration, under oath, that he is not.

The Court: That is a question for the court to determine; not the jury. They are permitted to determine whether the suspension was justified. I am to determine whether the conditions warranting reinstatement have been complied with.

Mr. Selvin: I understand that but, as your Honor said a few moments ago, the notice need not have been prepared in legal language; and, if the question of whether or not we [1258] charge Mr. Cole with being a Communist is of any relevancy to the questions to be submitted to the jury, then the notice is susceptible of the interpretation that, by saying, be-

fore we would take him back to work, he must prove that he was not, which is the equivalent of the charge.

The Court: If that is the equivalent of the charge, it is the first time it has been stated in these proceedings that that is your attitude and, if so, it should have been said to the court and jury. You should have said to the jury that is your interpretation and, not having said it, you are not entitled to have me bring it in and so consider it. Furthermore, the question of reinstatement is a question that is a part of the judgment, with which they have nothing to do. I have to determine whether the requirement for compliance was reasonable, was warranted and the like, and that is not a question of opinion, even as suggested, that should be submitted to the jury.

Mr. Selvin: We object to so much of that portion of the charge as discusses the legal position of the Communist Party in California, particularly in view of the exclusion of the evidence offered by the defendant to show that the Party does, in fact, advocate force and violence. And we object to the concluding portion of that subdivision of the charge which tells the jury that they should not speculate about the politics or political affiliations of any person involved on the ground that, in the manner given, it tends to eliminate from the consideration of the jury the question of what the effect upon the public was or tended to be in respect to their belief as to Mr. Cole's political affiliations.

The Court: That instruction was modified by stating they must determine that fact upon all of the evidence in the case.

Mr. Selvin: I think that concludes the objections which we have.

* * * *

[1260]

PROCEEDINGS AFTER OBJECTIONS TO INSTRUCTIONS

The Court: Ladies and gentlemen of the jury:

As a result of the conference between counsel and the court, some instructions have been modified and I will reread them to you in the modified form.

We have also made changes in the wording of the questions and shortened one of them, the fourth one. So I will read them again.

In the main instructions I defined certain words, giving you their meaning and stating to you that it is for you to determine, from all the evidence, whether the conduct of the plaintiff had the effect or tended to have the effect set forth in the notice which was based on the Clause 5 of the contract, which has been referred to as the morality and public conduct clause.

I repeat, in modified form, the summary which I gave at the end of the definitions and which has been modified:

In answering the special interrogatories which will be submitted to you, you must determine as to each whether the conduct of the plaintiff in the particular instance referred to—namely, his appearance before the Congressional Committee—was of such character that you, as jurors, can say that, under our American standards of right conduct, it did shock or tend to shock and offend the community and/or brought the

plaintiff or tend to bring the plaintiff into public scorn, hatred or contempt as herein defined. [1262]

I shall reread to you a portion of the instructions relating to the rights and duties of parties to a contract of employment.

In performing his duties under the contract, the plaintiff was required to comply substantially with its terms.

To apply these rules to the facts here: The plaintiff Lester Cole was employed by defendant Loew's, Incorporated, under a written contract of employment. That contract ran until November 15, 1949, with certain options. Where, as here, an employer suspends an employee during the term of his contract, the law requires the employer justify that suspension by a preponderance of the evidence.

In this case, the defendant having notified the plaintiff that it suspended the plaintiff upon the ground that he so conducted himself at this hearing and in connection with it as to bring himself or tend to bring himself into public scorn, hatred, contempt or ridicule, or shock or offend or tend to shock or offend the community or prejudice the defendant or the industry in general, they must show, and you must be convinced by a preponderance of the evidence that such was the case, before you answer the first three questions propounded to you in the affirmative.

In determining whether the conduct of Lester Cole had such effect, or if it had any such effect, you are to consider only the period between October 30, 1947, and December [1263] 2, 1947. This only means that the cause for suspension must have existed at that time. If it did exist, and you so find, then you may

consider whether it continued after the date of the notice.

An employer cannot penalize an employee simply by claiming a violation of a contract by the employee. In order to justify a claim of violation and a suspension or other penalty by the contract, the employer must show that the employee's act charged as violation was done or committed by the employee and that it was done wilfully and intentionally. Thus, in order to find that the plaintiff so conducted himself as to bring himself into public scorn, hatred, contempt, or ridicule, or to shock the community or prejudice the defendant, or that the conduct had such tendency, you must find, from all the evidence, and by a preponderance of the evidence, that his conduct, which it is charged had or tended to have that effect, was wilful and intentional.

A wilful act is an intentional act. It does not necessarily imply any evil intent on the part of the employee or malice on his part. It does not necessarily imply anything blamable or any ill will or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a [1264] free agent when he does it.

You were given some instructions as to acts and conduct in the record on the part of executives of the defendant before the hearing and acts and conduct, which it was testified to, took place after the hearing. I am not going to repeat the portion relating to any acts on their part occurring before Mr. Cole

went to Washington, acts which deal with the question as to whether the conduct was or was not authorized, but I will repeat the instructions as to conduct on their part after the hearing. They are brief and I shall read them as a whole.

You are instructed that even if an employer has the right to suspend an employee under a contract, he may, by his words and acts, and without reference to any act or conduct of the party affected thereby, waive this right. A waiver is such conduct of the employer as shows his election with full knowledge of all the facts and of his rights to forego the right to suspend, which he might otherwise have taken or insisted upon under the contract. Once such right is waived by the employer, it is gone, so far as the conduct, the particular conduct is concerned, and cannot be—

I think I will reread that last sentence because that verb “is” is wrong. It was not in the text.

Once such right is waived by the employer, with full knowledge of all the facts of his rights in the matter, it is gone, so far as the particular act concerned, and cannot [1265] be claimed by him, except for some other or different violation by the employee.

To put it into a brief sentence: An employer knowing of an employee's conduct and of his rights under the circumstances, and which might warrant suspension or termination of employment, may not continue after such knowledge to employ him thereafter and at a later date treat the employee's conduct as a breach of his obligation.

So, here, if you find that when Cole came back from Washington, Loew's knew of Cole's statements and

conduct before the House Committee in Washington in connection with the particular hearings, and knew fully what their rights were under the circumstances, but nevertheless, put him back to work and accepted his services with the intention of accepting Cole as its employee under the employment contract, then I instruct you that Loew's waived the right to rely upon such conduct in taking action against Cole.

As to these questions, the existence or non-existence of authorization before Cole's appearance in Washington and the existence or non-existence of the facts claimed as waiver, with full knowledge of the facts and the rights flowing from them, after the appearance, the burden is on the plaintiff to prove their existence or the existence of either of them by a preponderance of the evidence.

In all other respects, the instructions remain as read and, in the written instructions which you will have a right [1266] to have sent to you, you will find the instructions which I have reread to you, at the proper place where they were read to you before and in the form in which they were read to you finally, as now.

I stated to you that the form of the questions has been changed. So, in view of that, I will give to you again the order portion of the instructions.

Your first duty upon retiring to the jury room will be to select one of your number as foreman.

As you have already been informed, the jury, in federal courts, in both civil and criminal cases, is what is known as the common law jury, that is, it requires unanimity to return a verdict. In that respect, the federal law differs from the state law. In

the state court, in a civil case such as this, a verdict could be returned by nine persons on the jury. In this case the verdict of the jury will be in the form of questions to which your answers must be given. All of you must agree before an answer can be given to any of the questions in the special verdict.

The form of special verdict which has been prepared now reads as follows: [1267]

“In the District Court of the United States,

“Southern District of California,

“Central Division

“Civil No. 8005-Y

“LESTER COLE,

Plaintiff,

vs.

“LOEW’S, INCORPORATED, a Corporation, et
al.,

Defendants.

“SPECIAL VERDICT

“We, the jury, duly empaneled and sworn to try the within cause, hereby make the following answers to the following specific questions:

“Question 1:

“Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, bring himself or tend to bring himself into public hatred, contempt, scorn or ridicule?

(Answer “Yes” or “No”.)

“Answer:

“Question 2:

“Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, tend to shock, insult or offend the community? [1268]

(Answer “Yes” or “No”.)

“Answer:

“Question 3:

“Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, prejudice the defendant Loew’s, Incorporated, as his employer or the motion picture industry generally?

(Answer “Yes” or “No”.)

“Answer:

“Question 4:

“Did the defendant Loew’s, Incorporated, by its conduct towards the plaintiff, subsequent to the hearing, waive the right to take action against him by suspending him?

(Answer “Yes” or “No”.)

“Answer:

“Dated this day of December, 1948.

“ ,
Foreman.”

In answering these questions you are to take up each question separately.

If all of you agree that question No. 1 should be answered affirmatively, you will, through your fore-

man, insert the word "Yes" on the line opposite the word "Answer" under that question. [1269]

If all of you agree that the answer to that question should be in the negative, you will insert, through your foreman, the word "No" at the place opposite the word "Answer" under that question.

And the same method is to be followed as to each of the questions.

The proper answer which you give to each of the questions, "Yes" or "No," is to be inserted by your foreman after all of you have agreed as to the answers to be given.

Whatever your answers are as to these four questions, when they have been completed and the proper answers inserted, after each of the four questions, the special verdict must be dated at the place indicated and signed by your foreman and returned to this court.

Merely for the sake of the record, gentlemen, I am going to repeat the question again, as to whether there are any objections to the portions of the instructions I have reread and form of the questions, which have not been heretofore expressed in the court room by either side, either today or yesterday when we discussed the proposed instructions before the arguments to the jury? If so, in the interests of economy of time, counsel may approach the bench and state for the record any additional exceptions which are not already in the record.

Mr. Selvin: We have no additional ones, your Honor. [1270]

Mr. Kenny: The plaintiff has none.

The Court: All right.

* * * *

[The jury then retired to commence its deliberations.]

Bailiff Fuller: The instructions and the exhibits.

The Court: All right. Let the exhibits and the instructions be sent to the jury.

The Clerk: Do you wish to retype some of these?

The Court: No, they can read the handwriting. I have retyped [1274] most of those that are badly scarred. If they find difficulty—our jurors here are used to making requests and I think if they have a request, we will—

The Clerk: Did they ask for the exhibits, too?

Bailiff Fuller: They asked for the exhibits, yes.

The Clerk: Is there any point, your Honor, in sending the phonographic record to them?

The Court: No, no. They don't want entertainment.

* * * *

[1275]

The Court: Just a moment. Let the record show that the court has sent to the jury the instructions and the exhibits, other than the phonograph records.

Mr. Selvin: And the film.

The Clerk: The ones that were marked for identification.

The Court: I have a clerk that corrects me. You don't have one that stands at your side. He doesn't even want a compliment.

The Clerk: The exhibits that were marked for identification [1276] have been removed, and only those that were in evidence went there.

Mr. Selvin: I understand that neither the phono-

graph records nor the film have been sent to the jury.

The Court: That is correct. And the exhibits are the exhibits actually in evidence and not those marked for identification.

* * * *

The Clerk: Court's Exhibit No. 1, being that memorandum, is also retained. It is not sent.

The Court: I don't think you want me to send that brief of theirs in. [1277]

Mr. Walker: It is not my desire.

The Court: You do not?

Mr. Kenny: No.

* * * *

[1278]

(At the hour of 6:55 p.m. on Friday, December 17, 1948, the jury returned into court.)

The Court: Let the record show that the jury is in the box. The cause on trial.

(Case called by clerk.)

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: We have; yes.

* * * *

The Court: The clerk will read the verdict.

The Clerk: "In the District Court of the United States, Southern District of California, Central Division.

"Lester Cole, Plaintiff, vs. Loew's, Incorporated, a Corporation, et al., Defendant. Civil, No. 8005-Y.

"Special verdict.

"We, the jury, duly empaneled and sworn to try

the within cause, hereby make the following answers to the following specific questions:

“Question 1: [1281]

“Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, bring himself or tend to bring himself into public hatred, contempt, scorn or ridicule? (Answer ‘yes’ or ‘no’.)

“Answer: No.

“Question 2:

“Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, tend to shock, insult or offend the community? (Answer ‘yes’ or ‘no’.)

“Answer: No.

“Question 3:

“Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities in connection with the hearing held by said Committee, prejudice the defendant Loew’s, Incorporated, as his employer or the motion picture industry generally? (Answer ‘yes’ or ‘no’.)

“Answer: No.

“Question 4:

“Did the defendant Loew’s, Incorporated, by its conduct towards the plaintiff, subsequent to the hearing, waive the right to take action against him by suspending him? (Answer ‘yes’ or ‘no’.) [1282]

“Answer: Yes.

“Dated this 17th day of December, 1948.

“Mrs. Hazel B. Olney, Foreman.”

Ladies and gentlemen of the jury, is this your verdict as read?

The Court: Repeat it as to each of the questions asked.

The Clerk: Ladies and gentlemen of the jury, is this verdict as presented, with reference to Question 1, the verdict of each of you?

The Jury: It is.

The Clerk: So say you all?

The Jury: It is.

The Clerk: Ladies and gentlemen of the jury, is this your verdict, as presented, with reference to Question No. 2, the verdict of each of you?

The Jury: It is.

The Clerk: So say you all?

The Jury: Yes.

The Clerk: Ladies and gentlemen of the jury, is this your verdict, as presented, with reference to Question No. 3, the verdict of each of you?

The Jury: It is.

The Clerk: So say you all?

The Jury: Yes.

The Clerk: Ladies and gentlemen of the jury, with reference [1283] to Question No. 4, is it the verdict of each of you?

The Jury: It is.

The Clerk: So say you all?

The Jury: It is.

* * * *

[1284]

The Court: The clerk will enter and record the verdict. Ladies and gentlemen of the jury, I desire to thank you for your service in this case. The case has taken a good deal of your time and, because of

the exigencies of the case and because [1285] of the approach of the holiday season, it was necessary to work longer hours than we usually are accustomed to have juries work. You have been very patient during the case; you have been very attentive; you have even been good-natured when we have kept you out hours at a time and sometimes called you in just for a few minutes' session in the morning and half an hour in the afternoon. But the case was of such character that it required long and elaborate conferences, some of them in chambers and some of them in open court, outside of your presence. The time you have taken since the case was submitted to you, four hours at a minimum, shows that your answers are the result not of snap judgment but that you have arrived at the conclusion of the case by deliberation with your fellow jurors, with the exhibits in front of you. The next step is mine, in the light of the verdict which you have returned.

The cause is set for further hearing for Monday at 10:00 o'clock, at which time counsel for both sides will discuss with the court the legal implications of your findings and the type of judgment that should be made, because, as I have told you before, this is different from the ordinary case where the jurors are called upon to decide a case for the plaintiff or for the defendant. * * * [1286]

[Endorsed]: Filed Jan. 27, 1949. [1287]

December 20, 1948

The Court: Proceed, gentlemen.

Mr. Selvin: The plaintiff's counsel are looking at us sort of expectantly. I don't know that there is

anything for the defendant to say at this stage of the proceeding.

The Court: As I understand it, you made the statement the other day there is no additional testimony to be presented. Has either of you changed your minds since that time?

Mr. Selvin: No, sir.

Mr. Katz: No, sir.

The Court: I will hear any arguments you desire to present and, of course, the plaintiff has the opening and he may say anything he desires, and then I will hear from the defendant. I have the entire day, gentlemen. I cleared the calendar purposely so we will be absolutely free to close this case. As it is, it is suspended in the air and we have to close it. Proceed.

* * * *

Mr. Katz: I wanted to say with respect to that latter point that there is now in evidence and before your Honor the declaration of policy, which indicates more clearly than any mass testimony the existence of what is an impediment to the free opportunity of a screen-writer, in the class of Mr. Cole, at this time to getting other employment. And we think that, at a minimum, we are entitled, if the court follows the findings of fact of the jury, to a decree which is substantially as follows: As we see it, the provisions of the Labor Code, in effectuating a public policy for this State, are not unlike the provisions, in another context, of the Wagner Act. And, while it is true that in the ordinary relationship of employer and employee, where one has breached specific performance, a mandatory injunction can necessarily

follow, where the breach is one private in nature, where the problem involved enters into the area of public policy, we think the court can enter a decree in one of the following two ways, either compelling the reemployment of Mr. Cole or, if they fail to do so, requiring them to pay to him the compensation so long as he remains ready, able and willing to work for them. And, in addition, and this is, we think, necessary, if the equitable powers of this court are to be exercised, that there should be an injunction enjoining and restraining the defendant from interfering with Mr. Cole's efforts to work elsewhere. We think that the public policy problem which is here involved places this issue on a plane where it is not dissimilar from that already found in the Wagner Act, and that, under Sections 1101 and 1102 of the Labor Code, to effectuate the public policy of the State, it is possible that the court direct a decree requiring them to reinstate Mr. Cole pursuant to the terms of that contract, and that, in addition, and in any event, they be enjoined and restrained from in any manner either acting alone or acting in conjunction with anyone else—directed, of course, only at Loew's—but enjoining Loew's, either alone or in concert with anyone else, from interfering with Mr. Cole's efforts to obtain employment, if they will not reemploy him.

* * * *

Mr. Selvin: The verdict of the jury in this case has not changed the form of action, has not broadened its scope, has not enlarged the issues any. This was an action in which Lester Cole sought to have a declaration as to his rights under the contract. The

jury has found certain facts upon which his rights are predicated. Before the plaintiff had the verdict of the jury, they were quite insistent and the court agreed this was an action on a contract only and that nothing was involved but the very simple proposition of Mr. Cole's rights under this single contract. Now that they have favorable findings, we suddenly find the effort to transform and get a determination of the propriety of the so-called Waldorf policy, an issue as to which the defendant was not permitted to make his proof.

Mr. Cole has taken the position throughout this case he was not discharged; that his contract was not terminated; that he was suspended by a notice which, for various reasons, was an invalid notice, and he sought, in effect, a declaration that the notice was invalid because the grounds upon which it purported to rest did not exist. And that, in substance, it seems to me, is a cue to the sort of relief which should now be granted, he having obtained a determination of the facts.

The Court: Leaving aside the scope of your relief, it was your contention and you sought in your answer to bring out the fact, which, of course, did not require any additional proof to what was already in the record, that, whether the suspension provision applied, what took place was a termination and you argued in your brief that it was a termination and that it was not the subject of any proof; that it was a question of legal interpretation. You also argued that, whether you call it one or the other, that what you were seeking to avoid was the possibil-

ity that the Statute didn't apply and they might have had a ground for discharging him. Of course, the finding of the jury, so far as the fact is concerned, and assuming that I adopt it, doesn't talk about suspension. It talks about the doing of the act and it, in effect, holds that the doing of the act doesn't come within the morals clause. Therefore, the legal inferences to be drawn are not closed but are open.

Mr. Selvin: I understand that but the effect of the finding is simply a finding that, instead of Mr. Cole being in default, as we claim, we are in default. If Mr. Cole wants to treat our default as a termination of the contract, he may say so, but, up to this moment, no such interpretation of that action on his part has been vouchsafed, and, on the contrary, he has consistently maintained that our action, which he always claimed to be a breach of the contract, had not terminated the contract.

There is no question about the fact that there has never been a formal discharge. There is a question as to whether the refusal on the part of Loew's to employ him constituted such a breach as to bring about a termination of the contract.

The Court: That is up to him.

Mr. Selvin: That is up to him and he has not accepted it. So I go back to my—

The Court: I will put that down in my book. You and I actually agree for once.

Mr. Selvin: So far as Mr. Cole is concerned, who is now seeking a declaration of his rights, he has a contract, still in effect, which has not been terminated, with respect to which he has not been discharged. If that is true, he is not required to go out and seek

other employment. He has a contract of employment. Because that is true, that is ended; and he will go back to work in half an hour.

The Court: The time has passed for any settlement of this matter by agreement. We will let the facts take their course and I will determine it. After that, you can get together if you want to. I am not seeking any agreement. Let's go on.

Mr. Selvin: He is asking the court to declare these rights under what he says, and what up to the present time we must concede, is an existing contract; I mean on the facts now found. Under that contract, there is no obligation on our part to accept Mr. Cole's services or do anything except pay him his weekly salary. We are not required to use him or assign him to anything. We are not required to employ him in the sense in which the plaintiff uses the word "employ". And, if we use his services, then certain other obligations follow with respect to screen credit, which are not here in issue. So it seems to me the extent of the matter is that there is an existing and effective contract and that Mr. Cole is entitled to a declaration that he is entitled to a weekly salary pay up to date and his contract otherwise continued in existence.

The Court: I think you are in error. When it is a matter of computation, when the amount is known, and it is not a question of damages, judgment to that effect can be entered. That is the rule under both the State law and under the Federal law. And, whether I consider a State declaratory judgment of a Federal Statute in a judgment of this kind, I would order and hold not only that he is entitled to it but I would give him judgment so that he would have the benefit

of the process to cover it, because, if that were true, your company could take the position that was merely a declaration of right and he would have to bring a separate suit to enforce collection. That is not the object of this lawsuit. If that were true, then we would be in the same position as the Supreme Court was in the famous *Muskrat* case, where they indicated that declaratory judgments were merely declarations in thei, and that, because there was no coercive power behind the judgments, they were invalid. Justice Brandeis, who wrote that opinion, changed his mind later on. Originally, it was true there was no coercive action behind them, but, when the court renders a judgment which can be transmuted by mere mathematical computation into money, the court has the power to state the amount, that is, order it, in order to give the benefit of the coercive power of the court. Otherwise, Mr. Cole would be compelled to go again to court and seek not an enforcement of this judgment, which he can get by going to the clerk, but to seek another adjudication because he has no judgment for the amount. I am absolutely convinced that in this case I can render a judgment for the amount due as of today and order execution issued in that amount. Go ahead.

Mr. Selvin: Whether it is in the form of a coercive or declaratory judgment doesn't negate the fact that the declaration or the coercive declaration in respect to money due him, under the present circumstances of the validity of the contract, are the limits to which this declaration can go.

The Court: That is true but this was not merely a declaration. It was also an action for equitable

relief and, as a part of the equitable relief, the court has power upon the same facts or additional facts to order things which it could not do under the declaration part.

Mr. Selvin: So far as the equitable relief is concerned, I assume your Honor refers to an injunction. The plaintiff put in no additional evidence on the injunction and, accordingly, the defendant has not. A mandatory injunction compelling a performance of this contract is, if it is permissible at all, certainly not permissible on the present record. It hasn't been shown that the injury is irreparable or that damages would be inadequate. In fact, there is no question of damages in the case because, under the first declaration your Honor must make, the contract must be declared an existing contract. There is no showing, such as would be required under the law of California, sufficient to justify an injunction against a breach of contract. That is all that is involved here so far as Loew's is concerned. Upon findings that Loew's has breached its contract, an injunction would, in effect, enjoin a continuation of that breach. The California law is well settled that, with certain exceptions, an injunction will not lie to enjoin the breach of a contract, and those exceptions have not been made out in this case. There hasn't been any proof, assuming that the Lumley vs. Guy exception is applicable to this case, that Mr. Cole's services are unique or special, or whatever the adjectives are in that section. There has been no showing that, so far as this contract is concerned, he is irreparably injured and that the damages are not adequate. Is

the court going to take over the monitorship of this contract?

The Court: We have that power. Many a time I have exercised it and have been surprised as to what happened. You must do so in the State court. The injunction is an answer to a proceeding, just like a receivership in the Federal courts.

In the Federal courts, both receivership and injunction are answers in themselves and we have very great power to maintain jurisdiction.

Likewise, in a case that involved a lot, almost as much feeling as this case, the famous case of Savage against Lorraine, which went to the Circuit Court at least five times, there was every possible writ, they tried to mandamus me, prohibition me and do everything in the world, and in that particular case, in order to terminate it, I determined the rights under a partnership agreement and it occurred to me that the real determination of the lawsuit might end that controversy and breed others, so I put in the memorandum that I filed on the findings a small clause, the meaning of which wasn't apparent to anyone but myself, I put in the fact that I retained jurisdiction in the future to deal with situations as they arise and either by injunction or by receivership and the like, see that the decree was complied with. It was the most salutary thing, so far as the litigants were concerned, that could have been thought of, because right after I held that Mr. Savage was merely a trustee, and between the time I announced the decision and the time of formal findings, he put himself in control of the corporation, which he could do

without the violation of any order, and loaned himself money and took such a hold of the affairs of the corporation as to have made my decree nugatory. So, immediately, attorneys taking advantage of that statement, brought further action and I issued an injunction and appointed a receiver, with the result that I ran that plant for a period of three years while they were litigating.

I am merely indicating that as to the extent of powers that we have in the Federal courts. We are not governed by the limitations of the old French Bank case and of blessed or unblessed memory which ties the hand of a State judge in these matters.

We have the great equity power of the chancellor, that the chancellor had, and you remember the old saying, the reach of equity is as long as the chancellor's foot, or something like that, which we were taught.

So, when it comes to injunction, I am not bound by what the law of California is, because that is a remedy and, mind you, on the remedy, the moment you get into this court, the only thing I am bound by is the substantive law of contracts, but anything relating to the remedy, to the extent of the relief to be granted by our own rules and not by the rules of the State courts of California.

Mr. Selvin: But you cannot by the breadth of the Federal remedy enlarge Mr. Cole's substantive rights under the laws of California.

The Court: So, many a time, not only in the United States but in the history of law, great rights

have been affected by change of remedy. To illustrate, for instance, the greatest thing that happened in the law of libel, in England, was a change of remedy, the law which allowed the jurors in criminal cases to be the judges of the law and the facts. The greatest blow was struck for free speech when that little remedy was enacted, and there are many other instances where remedies have had that effect. That is why modern students do not speak disparagingly any more, contemptuously. This affects remedies and not rights.

Remedies are very substantial and may affect rights. Mr. Justice Douglas, in his last book, "I Am An American", has a lecture that he gave on the importance of remedies in maintaining the rights of citizens, and every modern student realizes that.

Mr. Selvin: Well, I think I have indicated to your Honor our ideas.

The Court: Well, I am not interrupting you. I want to set ourselves right as to what I consider as to what part of the law of the State is binding on me and what is not, and give you an opportunity to set me right. You convinced me several times during the course of this trial that I was wrong, and I adopted your view, even to the last moment; I adopted your view as to the form of the three questions. So, my making the statement is merely to show what is in my mind, because it is the only opportunity that you will have, now, to set me right.

Mr. Selvin: Well, I will repeat in somewhat different form that if, as we maintain, and I think correctly, the sole mandatory obligation, that is, the

sole unconditional obligation of Loew's toward Mr. Cole, under this contract, is to pay him his weekly salary so long as he is ready, willing and able to perform, that right cannot be enlarged into anything more, regardless of how broad the Federal equity power is, in my opinion.

I think I have indicated the gist of our analysis of the situation on the present findings and indicated to what extent I think the court should declare the rights of the parties, and our general objections to the sudden and unlimited expansion which the plaintiff seeks to bring to pass in this case.

And with that, I think the matter may be submitted so far as the defendant is concerned.

* * * *

The Court: The court will adopt as his own the findings of the jury returned on the special verdict contained in the answers to the four questions propounded and, on the basis of those answers and the findings which are implicit in the answers, the court will make the following findings and declarations:

The Court Finds that the notice of December 2, 1947, by Loew's, Incorporated, suspending the employment of the plaintiff for the reasons therein indicated is null and void; that the ground therein stated, the appearance before the Committee, was not a ground for the order of suspension; that the action of the plaintiff, when appearing before the Committee and his entire conduct with relation to the hearings, either before or at or about the time, were within his rights and did not constitute a breach on his part of Clause 5 of the contract which has

been designated as the public relations morality clause, or any other portion of the contract; that it was not a ground for suspension or for termination of the contract; that no other ground was stated in the notice and none has been shown to exist; and

I Will Find that at that time no ground existed for the suspension or, rather, for the temporary termination, if I might call it that, or the termination of the contract between the plaintiff and the defendant.

The Court Finds that plaintiff is entitled to receive from the defendant the salary which has not been paid to him since the notice of suspension, at the rate of \$1,350 per week, to the present time and until his reinstatement.

The Court Finds that the notice of suspension was a breach on the part of the defendant of its obligations under the contract and a breach of the rights of the plaintiff under the contract.

The defendant will be ordered to reinstate the plaintiff, failing which it is to continue to pay to him the weekly compensation under the contract, and

The court will retain jurisdiction, continuous jurisdiction, for the purpose of entertaining any further proceedings in regard to the future actions of the plaintiff, so that if the defendant should not reinstate him, the plaintiff need not resort to another action in order to recover compensation not yet earned, but may come into court, as is permissible at all times in an equity case, by supplemental action, which is now permissible in the Federal court

even without supplemental action, and have judgment for such additional sums in the future as may become due, and it will also take care of the situation of an appeal, should there be an appeal in this case, because otherwise, if the judgment merely goes to the date of the judgment, it takes some two to two and a half years to decide a case of this character and of its magnitude in the Circuit Court of Appeals, and large sums of money might become due and the plaintiff might be compelled to seek independent action, as these amounts become due. In other words, I am exercising the same jurisdiction that the State courts exercise when they are dealing with a continuous contract, such as for rent, by not compelling the plaintiff, when they have found that the defendant has breached the contract, to bring a suit every month to collect the money; and under the equity power, I have the right to do so, and the judgment should be so drawn that the court should retain the power until the conclusion of the contract period.

Injunction will issue preventing the defendant from continuing in effect the notice of suspension, and I will require them to enter a resolution upon the minutes of the board cancelling the effect of it and declaring the suspension at an end.

Unless there are other matters which I have overlooked, or as to which either of you desire to call to my attention, that will be the general nature of the findings and judgment to be entered.

* * * *

CERTIFICATE

We hereby certify that we are duly appointed, qualified and acting official court reporters of the United States District Court for the Southern District of California.

We further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of our stenographic notes, respectively.

Dated at Los Angeles, California, this 29th day of March, A.D., 1949.

/s/ HENRY A. DEWING,

/s/ THOMAS B. GOODWILL,

/s/ SAMUEL GOLDSTEIN,

/s/ ROSS REYNOLDS,

/s/ J. D. AMBROSE,

Official Reporters.

[Endorsed]: Filed Jan. 11, 1949.

[Endorsed]: No. 12222. United States Court of Appeals, for the Ninth Circuit. Loew's, Incorporated, a Corporation, Appellant, vs. Lester Cole, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 7, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 12222

LOEW'S, INCORPORATED,

Appellant,

vs.

LESTER COLE,

Appellee.

APPELLANT'S STATEMENT OF POINTS
INTENDED TO BE RELIED UPON

Pursuant to Rule 19, subd. 6, Loew's, Incorporated, appellant herein, hereby state the points upon which it intends to rely in the appeal herein as follows:

1. The District Court erred in its rulings on the admission and exclusion of evidence in the following respects:

(a) In not permitting the witness Louis B. Mayer to testify to the reasons for his approval of the statement of policy adopted by appellant and others on November 24, 1947.

(b) In not permitting evidence of the conduct, testimony and activities before the House Committee on Un-American Activities of all of the ten so-called unfriendly witnesses; and in limiting such evidence to the conduct, testimony and acts of appellee.

(c) In permitting the appellee Lester Cole to testify that he could not work elsewhere during the period of suspension.

(d) In not permitting the appellee Lester Cole to be cross-examined in respect of the asserted bias and enmity of one James J. McGuinness toward the witness.

(e) In limiting and curtailing the cross-examination of appellee Lester Cole in respect of the importance to him of Louis B. Mayer's approval of his conduct.

(f) In limiting and curtailing the cross-examination of appellee Lester Cole in respect of his knowledge at the time of his appearance before the House Committee on Un-American Activities, of the purposes and objects of Communism and the Communist Party, of the state of public opinion with respect thereto, and the reasons which prompted him to conduct himself as he did before that Committee.

(g) In limiting and curtailing the cross-examination of appellee Lester Cole in respect of membership in the Communist Party.

(h) In limiting and curtailing the cross-examination of appellee Lester Cole in respect of the matters which he took into consideration and the possible consequences to which he adverted before conducting himself as he did before the House Committee on Un-American Activities.

(i) In limiting the cross-examination of appellee Lester Cole, and the evidence generally, to justification of appellant's alleged wrongful breach of contract upon the precise grounds specified in the notice of suspension and not permitting justification on any ground which in fact existed.

(j) In not permitting evidence to be introduced by appellant as to the reasons for, and the facts and information upon which was based, the statement of policy adopted by appellant and others with respect to the employment of Communists or of persons who refused to disclose whether or not they were Communists, while at the same time permitting appellee to introduce evidence of the adoption of such a policy and to characterize it as a "blacklist".

(k) In permitting appellee to introduce evidence of payment of salary, conversations with officers of appellant, and other alleged acts of waiver and condonation.

(l) In not permitting appellant to introduce evidence of the facts and information upon which it based the suspension complained of.

(m) In not permitting appellant to introduce evidence of the state of public opinion with respect to Communism, the Communist Party, appellee's conduct before the House Committee on Un-American Activities, and appellee's membership in the Communist Party.

(n) In not permitting appellant to introduce evidence of the unlawful objects and activities of the Communist Party.

(o) In not permitting appellee to be cross-examined as to whether he was in fact a member of the Communist Party.

2. The District Court erred in refusing to give appellant's requested instruction number 7.

3. The District Court erred in charging the jury, upon its own motion or at appellee's request, that:

(a) Appellee's conduct was a breach of the employment contract only if it actually brought him into public scorn, contempt, hatred or ridicule, as distinguished from tending to have that effect.

(b) Appellee's conduct, if otherwise lawful, would not be a breach of the employment contract.

(c) Whether appellant, as a matter of law, had justification for suspending appellee was for the jury to decide.

(d) Whether appellee's conduct, as a matter of law, amounted to a breach of the employment contract was for the jury to decide.

(e) The jury could consider and determine the question of asserted waiver by appellant of appellee's breach of contract; or of any estoppel of appellant to assert a breach.

(f) In determining the question of waiver the jury might consider evidence of the parties' acts prior to the commission of the alleged breach of contract.

(g) Consideration of the grounds of justification was confined to the grounds specified in the notice of suspension.

(h) Good faith was essential to justification.

(i) A written notice of suspension was required under the contract of employment.

(j) The rights of witnesses before a Congressional Committee were as specified in subdivision V of the

charge; or that the law in that regard had any bearing on the issues of fact submitted to the jury.

(k) The jury might consider whether, as a matter of law, appellee's conduct amounted to a contempt of Congress.

(l) "Politics" and "political activities" were defined as specified in subdivision VI of the charge.

(m) The legal position of the Communist Party was as specified in subdivision VII of the charge.

(n) The law of libel was as specified in subdivision VII of the charge, or that such law had any bearing on the issues of fact submitted to the jury.

(o) Appellant had not charged appellee with being a Communist; or that his membership in the Communist Party had no bearing on the issues of fact submitted to them.

(p) In determining the question of waiver, that a waiver occurred if the appellee in good faith concluded he was justified in acting as he did and without regard to whether such a conclusion was justified by the facts.

(q) The appellant had the right to instruct or direct appellee as to how he should testify or conduct himself before a Congressional Committee; or that a failure so to direct or instruct had any bearing on the issues of fact submitted to the jury.

(r) A waiver resulted, as a matter of law, from the conduct specified in subdivision IV of the charge.

4. The District Court's charge in respect of cer-

tain matters covered thereby was incomplete in that:

(a) In singling out specifically the testimony of Louis B. Mayer and E. J. Mannix, as bearing on the question of waiver, the Court did not direct attention to all of the testimony, given by these and other witnesses, bearing upon that question.

(b) The Court did not instruct as to all of the elements necessary as a matter of law to bring about a waiver or an estoppel.

(c) The Court did not instruct as to the burden of proving waiver or estoppel.

(d) The Court, in instructing upon the rights of witnesses before Congressional Committees, did not charge that a refusal to answer pertinent questions was a criminal violation of law.

(e) The Court did not instruct with respect to facts judicially noticed as to the state of public opinion regarding Communists, Communist sympathizers, and the Communist Party.

(f) The Court did not instruct that the Communist Party was an illegal organization in California if in fact it advocated the overthrow of our present form of government by force and violence.

5. The District Court erred in submitting a special verdict regarding waiver to the jury.

6. The District Court erred in excluding from the special verdicts to be rendered by the jury any question relating to appellee's conduct in connection with the hearings before the House Committee on Un-

American Activities, other than conduct directly in the presence of the Committee.

7. The cumulative effect of the District Court's rulings and comments on appellant's opening statement, on evidence and on motions and requests of appellant's counsel was to deny a fair trial to appellant.

8. The District Court erred in making findings of fact in addition to those found by the jury.

9. The District Court erred in denying appellant's application to transfer the cause to another judge on the ground of bias and prejudice and in refusing to order or consent to any such transfer.

Dated April 6, 1949.

/s/ IRVING M. WALKER,

/s/ HERMAN F. SELVIN,

Attorneys for Appellant.

[Endorsed]: Filed April 7, 1949. Paul P. O'Brien,
Clerk.